Submitted by DE
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Oct. 26. 1927

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 70

LOUISVILLE GAS & ELECTRIC COMPANY,
PLAINTIFF IN ERROR,

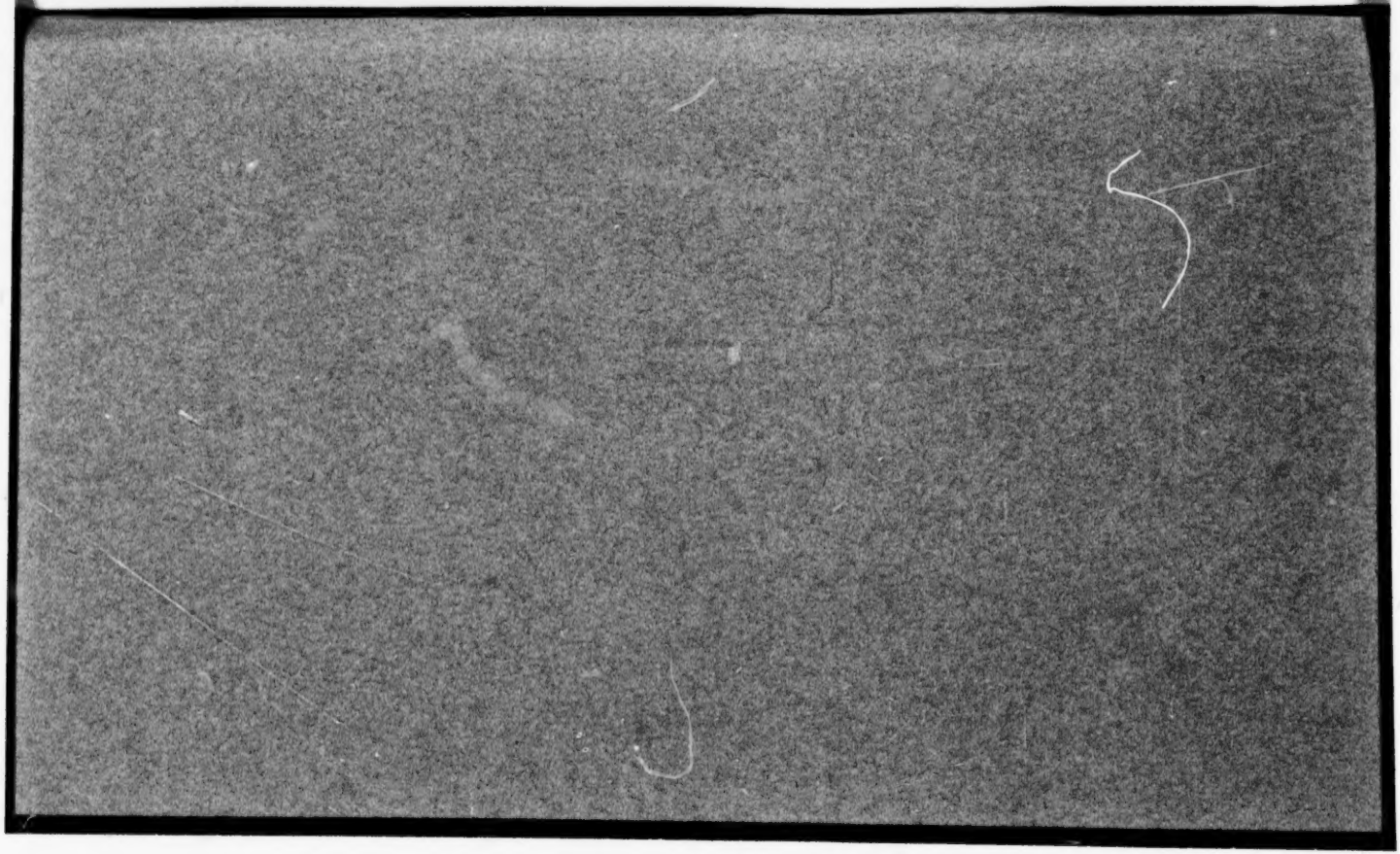
vs.

W. H. SHANKS, AS AUDITOR OF THE STATE OF KENTUCKY

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

FILED MAY 12, 1928

(31,954)



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No. 388

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

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[fols. 1 & 2] [Captions omitted]

[fol. 3]

IN CIRCUIT COURT OF FRANKLIN COUNTY

LOUISVILLE GAS & ELECTRIC COMPANY, Plaintiff,

vs.

W. H. SHANKS, as Auditor of State of Kentucky, Defendant

PETITION—Filed November 21, 1924

The plaintiff, the Louisville Gas & Electric Company says that it is now and was at the several dates hereinafter named, a public service corporation, created and existing under the laws of this State, with power to own and operate electric light and gas plants in the city of Louisville, and elsewhere to make contracts, sue and be sued.

Plaintiff says that the defendant, W. H. Shanks, is the duly elected, qualified and acting Auditor of the State of Kentucky.

Plaintiff states that the Harris Trust & Savings Bank, hereinafter called the Trust Company, is now and was at dates hereinafter named, a corporation created and existing under the laws of the State of Illinois, with power to act as Trustee in deeds of trust or mortgage, to sue and be sued.

Plaintiff says that on the 1st day of November, 1922, it made, executed, and delivered to said Harris Trust and Savings Bank a certain deed by which it conveyed to said Trustee all its electric plant, electric wires, poles and equipment, its gas plant, gas mains and equipment, and all its real estate and other property in the City of Louisville and State of Ky. to secure the payment, principal and interest, [fol. 4] of an authorized issue of bonds of plaintiff to the extent of One-hundred and fifty millions of dollars ($150,000,000) of which there was to be and was an initial issue of eighteen million eight hundred and five thousand ($18,805,000) dollars in bonds of $1,000 each, bearing 5% interest, date Nov. 1st, 1922, and due and payable Nov. 1st, 1952, issued as in said deed of trust provided.

Plaintiff says that to make said bonds marketable or available to this plaintiff as a means of financing its business and meeting its financial obligations, as set out in said deed of trust, it became and was indispensably necessary under the law of Kentucky, that the said deed of trust should be placed on record in the several County Clerk's offices of the Counties in which the land and other property in said deed of trust described was located namely, Jefferson, Ohio, Oldham, Hardin and Meade Counties, Ky.

Plaintiff states that the said deed of trust was duly executed, signed, sealed and acknowledged by it and by said Harris Trust & Savings Bank, as Trustee, before an officer duly qualified to take their acknowledgments thereof, and their acknowledgements thereof were duly certified by such officer on said 25th of November, 1922. A duly certified copy of said deed of trust is filed herewith and made part hereof as "Exhibit A."

Plaintiff says that there was on said day affixed to said deed of trust, and cancelled, Nine Thousand, four hundred and two and 50/100 ($9,402.50) dollars United States documentary revenue stamps, evidencing payment of the tax on said initial issue of $18,805,000, in bonds.

Plaintiff says that thereafter on the 27th day of Nov., 1922, it presented said Deed of Trust for record in the Jef- [fol. 5] ferson County Court Clerk's office and to the Clerk of said Court for record, and paid to him the usual and lawful recording fee of $1.25 and two cents for every twenty words in said deed of trust over twelve hundred words, in all $90.00 as by statute provided, and requested that said Clerk record said deed in his office. Said Jefferson County Clerk's office was the first County Clerk's office in which said deed of trust was lodged for record.

Plaintiff says that the said Clerk refused to place said deed of trust on record in his said office unless and until plaintiff paid to him in addition a tax of twenty cents on each one hundred dollars of said $18,805,000 or $37,610, in accordance with the requirements of sub-section 9 of section 4019 A of the Kentucky statutes. Plaintiff says that it was, as hereinbefore set out, indispensably necessary that said deed of trust should be immediately recorded in the clerk's office, and that plaintiff was thus compelled to pay and did pay to the state of Kentucky, through the

County Clerk aforesaid the said sum of $37,610, in excess of the lawful recording fee, as above, and said sum of $37,-610, was exacted from plaintiff wrongfully and without right.

Plaintiff says that the statute aforesaid known as subsection 9 of section 4019a of the Kentucky statutes under and by which said imposition of twenty cents tax on each one hundred dollars of indebtedness where the indebtedness secured by a deed of trust or mortgage does not mature within five (5) years was made was and is illegal, unconstitutional, and void, that said tax is not imposed by said statute or any statute of Ky. on any indebtedness secured by mortgage where the indebtedness so secured matures [f 6] within five (5) years; that mortgages to Building and Loan Associations, of which there are a number in Ky. are expressly exempted from its operation; that the said statute is class legislation, discriminatory, and intended to deny, and does deny, to persons whose needs or requirements call for mortgages loans for more than five years, the equal protection of the law; that is is contrary to section 171 of the constitution of Ky. and destroys the uniformity and equality in taxation required by said section and other sections of the constitution of this state; that the classification which is attempted to be made by such statute is arbitrary, illegal, and unreasonable; that the tax by said statute attempted to be imposed on debts accrued by mortgage where the indebtedness does not mature within five years is illegal, excessive, and confiscatory; that by the enforcement of said statute against this plaintiff as herein set out, and unless plaintiff is granted the relief prayed for herein the plaintiff will be denied the equal protection of the law and the rights secured to it by the Fourteenth Amendment of the Constitution of the U. S. and deprived of its property without due process of law, and plaintiff especially pleads and relies herein on the rights so secured to it under the constitution of the United States.

Plaintiff says that the said sum of $37,610.00 so wrongfully collected from this plaintiff was thereafter paid into the treasury of the state of Kentucky when the same and no part thereof was in fact due, and it has become and is the duty of the defendant as State Auditor, as provided by

Statute, to issue his warrant on the treasury of the state of Ky., in this plaintiff's favor for the said sum of [fol. 7] $37,610.00 and plaintiff has demanded the issual of said warrant but defendant has refused to issue same.

Wherefore plaintiff prays that this Honorable Court grant by its judgment a writ of mandamus against the defendant, W. H. Shanks, as Auditor of the State of Kentucky, requiring him to issue his warrant in plaintiff's favor on the treasury of the State of Kentucky for the said sum of $37,610 with interest from this date, for costs, and all proper relief.

Matt O'Dougherty, Attorney for Plaintiff.

Duly sworn to by T. B. Wilson. Jurat omitted in printing.

[fol. 8] Summons and sheriff's return omitted in printing.

[fol. 9] In Circuit Court of Franklin County

[Title omitted]

Minute Entry—December 5, 1924

Came the plaintiff, by attorney, and filed and amended petition herein; also filed a notice duly served upon the defendant and a motion for a mandamus against the defendant to require him to issue plaintiff a warrant upon the State Treasurer for the sum of $37,610.00 as prayed for in its petition; upon which motion the Court takes time.

Thereupon the defendant filed a general demurrer to plaintiff's petition and amended-petition and said demurrer is passed for further hearing.

[fol. 10] In Circuit Court of Franklin County

[Title omitted]

Amended Petition

The plaintiff by leave of Court amends its petition herein and realleging all the averments thereof, for the purpose of making same more specific, states that the initial issue of $18,805,000 of bonds, as set out in article 2, page 77, of the deed of trust to the Harris Trust & Savings Bank, trustee, and in the petition referred to, was made to provide funds for the payment of outstanding bonds in the amount of $14,500,000, maturing January, 1923, secured by a prior mortgage from the plaintiff to said Harris Trust & Savings Bank, trustee, of and on the same property in said deed of trust described, and for the discharge of other obligations of the plaintiff.

Plaintiff says that at the time it presented said deed of trust to the Clerk of the Jefferson County Court for record as in the petition set out, it had already arranged for the immediate underwriting of the said $18,805,000 of bonds and for the payment and discharge by the proceeds of said $18,500,000 of the prior outsanding mortgage bonds and other indebtedness of the plaintiff. But that it could obtain none of said funds for said purpose or any purpose unless and until the deed of trust aforesaid securing the same was placed on record in the county clerk's office as in the petition set out.

[fol. 11] Plaintiff says that the failure to place said Deed of Trust on record in said Clerk's office would have entailed a very great loss upon this plaintiff and would have greatly impaired the credit and financial standing of this plaintiff.

Plaintiff says that under the law of Kentucky bona fide deeds of trust or mortgages take effect in the order that the same are legally acknowledged or proved and lodged for record, and such deeds of trust are good against innocent purchasers or mortgagees only from the time they are legally acknowledged or proved and lodged for record.

Plaintiff says that when it had paid the usual and legal recording fee to the Jefferson County Court Clerk, and when he refused to receive or record the said deed of trust

as in the petition set out unless and until plaintiff paid to him the tax of twenty cents on each one hundred dollars of said $18,805,000 or $37,610.00, which was the amount of the tax computed by said Clerk to be due on said indebtedness of $18,805,000, it had no alternative but to pay said alleged tax or suffer great financial loss and impairment of credit, and so plaintiff was compelled to pay and did pay, but unwillingly and under protest to the said Clerk of the Jefferson County Court, the said sum of $37,610.00 tax, and he endorsed his receipt thereof on said deed of trust as shown by the certified copy thereof filed with the petition.

Wherefore plaintiff prays as in its petition.

Matt O'Dougherty.

[fol. 12] *Duly sworn to by T. B. Wilson. Jurat omitted in printing.*

[fol. 13] In Circuit Court of Franklin County

[Title omitted]

Notice of Petition for Mandamus

The defendant, is hereby notified that the plaintiff has filed in the Franklin Circuit Court a petition for mandamus, a copy of which said petition is attached hereto and made part thereof, and the defendant is notified that on Friday, December 5th, 1924, the plaintiff will move the Court for a writ of mandamus in its favor to require the defendant to issue to the plaintiff a warrant in its favor on the State Treasury for the sum of $37,610.00 the amount paid by it on Nov. 27, 1922, to the Clerk of the Jefferson County Court over and above the legal recording fee as a tax or fee for the recording of the deed of trust from the Louisville Gas & Electric Company to the Harris Trust and Savings Bank, trustee which sum was exacted from this plaintiff by the said Clerk and paid into the treasury under and by virtue of sub-section 9 of section 4019a of the Kentucky Statutes.

The return of this sum to this plaintiff is claimed on the ground and for the reason that the said Statute under

which said exaction was made, is void because it is in violation of the Constitution of this state and of the 14th Amend-
[fol. 14] ment of the Constitution of the United States, as set forth in the Petition.

Louisville Gas & Electric Company, by Matt O'Dougherty, Atty.

Nov. 24, 1924.

I accept service of above notice this Nov. 26, 1924.

Frank E. Daugherty, Atty. Gen., by Chas. F. Creel, Asst. Atty. Genl.

In Circuit Court of Franklin County

[Title omitted]

Motion for Writ of Mandamus—December 5, 1924

This day came plaintiff by counsel and filed herewith a notice duly executed upon the defendant on November 26th, 1924, and pursuant thereto moved the Court for a writ of mandamus against the defendant, W. H. Shanks as Auditor, requiring him to issue in this plaintiff's favor a warrant on the State Treasury for the sum of $37,610.00 as prayed for in the petition.

Matt O'Dougherty, Counsel for Plaintiff.

[fols. 16 & 17] In Circuit Court of Franklin County

[Title omitted]

Demurrer

The defendant, W. H. Shanks, Auditor of the State of Kentucky, demurs to the Plaintiff's petition and amended petition because the same does not state facts sufficient to constitute a cause of action.

Frank E. Daugherty, Atty. Genl., by Chas. F. Creal, Asst. Atty-Genl., Attorneys for Defendant.

In Circuit Court of Franklin County

[Title omitted]

Minute Entry—December 15, 1924

Came the defendant, by Attorney, and tendered and offered to file a judgment herein.

[fols. 16 & 17] In Circuit Court of Franklin County

[Title omitted]

Judgment—December 18, 1924

This cause coming on to be heard on the defendant's demurrer to the petition as amended and the Court being sufficiently advised sustain said demurrer, and plaintiff declining to further plead, it is the judgment of the court that the petition herein be dismissed and that the defendant recover of plaintiff his costs about this action and execution may issue, to all of which the plaintiff objects and excepts, and prays an appeal to the court of appeals, which is granted.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 18] In Court of Appeals of Kentucky

Louisville Gas & Electric Company, Appellant,

vs.

W. H. Shanks, as Auditor of State of Kentucky, Appellee

Statement of Appeal—Filed March 12, 1925

The appeal in this case is from the judgment of the Franklin Circuit Court rendered on the 18th day of December, 1924, and found on page 17 of this record.

The appeal was granted in the Court below and no process need issue thereon.

The Counsel for the Appellant is Matthew O'Doherty, Inter-Southern Building, Louisville, Kentucky, and counsel for the Appellee is Hon. Frank E. Dougherty, Atty. General of Kentucky, Frankfort, Kentucky.

Matt O'Doherty, Counsel for Appellant.

March —, 1925.

[fol. 19] In Court of Appeals of Kentucky

Minute Entry—June 9, 1925

Ordered that this case be continued to the next Fall term.

Minute Entry—December 4, 1925

Ordered that this case be submitted.

[fols. 20 & 21] In Court of Appeals of Kentucky

[Title omitted]

Judgment—March 26, 1926

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that the said judgment be affirmed, which is ordered to be certified to the said Court.

It is further considered that the appellee recover of the appellant his cost herein expended.

[fol. 22] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

OPINION OF THE COURT BY COMMISSIONER SANDIDGE, AFFIRMING—March 26, 1926.

By this appeal appellant attacks Section 4019a-9, Kentucky Statutes, as being in violation of the Fourteenth Amendment of the Constitution of the United States, and of Section 3 of the Bill of Rights, and Sections 170 and 171 of the Constitution of Kentucky. The statute in question provides that for the privilege of recording mortgages when the indebtedness so secured does not mature within five [fol. 23] years, a tax of 20 cents upon each $100.00 or fractional part thereof of such indebtedness shall be paid, exempting from its operation mortgages to building and loan associations. The case of Middendorf, Clerk, etc., vs. Goodale, et al., Trustees, 202 Ky., 118, presented to this court the exact questions here raised. There the statute in question was attacked from the same positions taken by appellant here. The Middendorf case was orally argued to and was considered by the whole court. The opinion deals exhaustively with all the questions raised by appellant as affecting the validity and constitutionality of the statute in question. The conclusion of this court that the statute in question does not contravene any of the provisions of either the Federal or State constitution was reached after giving full weight to all of the arguments now made by appellant, and after deliberate consideration of the questions involved. That opinion expresses this court's views upon all of them fully and clearly. Repetition is not deemed to be necessary.

The trial court sustained a demurrer to the petition of appellant which sought to compel the Auditor to issue his warrant in its favor for $35,610.00, that being the amount of the privilege tax paid by it under protest when it had a deed of trust recorded, which it sought to recover herein upon the ground that the statute, supra, is unconstitutional and void. Entertaining the same views with respect to the [fols. 24 & 25] validity and constitutionality of the mortgage recording tax statute that were set forth in the Middendorf case, supra, we conclude that the trial court properly sus-

tained the demurrer. The judgment herein, therefore, will be affirmed.

Judgment affirmed.

Matt O'Doherty, Louisville, Ky.; Cummins, Roemer and Flynn, Louisville, Ky.; Alex P. Humphrey, for appellant.

Frank H. Daugherty, Atty. Gen., Frankfort, Ky.; Chas. F. Creal, Asst. Atty. Gen., Frankfort, Ky., for appellees.

[fol. 26] In Court of Appeals of Kentucky

[Title omitted]

Assignments of Errors—Filed May 6, 1926

Now comes the plaintiff in the above entitled cause and filed the following assignment of errors upon which it will rely upon the prosecution of its appeal in the above entitled cause from the judgment rendered by this Honorable Court on the 26th day of March, 1926, pursuant to opinion rendered March 26th, 1926:

(1) That the Court of Appeals of Kentucky erred in affirming the judgment of the Franklin Circuit Court sustaining the defendant's demurrer to the plaintiff's petition and dismissing plaintiff's said petition;

(2) The court erred in holding and adjudging that the plaintiff was not denied the equal protection of the law by the assessment and enforcement against it of the tax of $37,610.00 under Section 4019A Kentucky Statutes in its petition complained of:

(3) The court erred in holding and adjudging that the plaintiff was not by the assessment and collection of said tax deprived of its property, namely $37,610.00, without due process of law:

(4) The court erred in holding and adjudging that no right secured to the plaintiff by the Fourteenth Amendment to the United States Constitution was violated by the imposition and collection by the defendant of the tax of $37,610.00 in the petition complained of:

(5) The court erred in holding that the Statute of Kentucky known as Section 4019a Kentucky Statutes authorizing the assessment, imposition and collection of said tax of 20 cents of each $100 of indebtedness secured by mortgage where the debt secured thereby does not mature within five years, while exempting from such tax all indebtedness secured by mortgage maturing within five years, and exempting from the tax all indebtedness secured by mortgages to building and Loan Associations, is not in conflict with the provisions of the Constitution of Kentucky, especially Section 170 thereof requiring equality and uniformity in the assessment and collection of taxes and expressly inhibiting all exemptions by the legislature other than those named in Section 170 of the Constitution of Ky.

[fol. 27] (6) The court erred in holding that Section 4019a Kentucky Statutes authorizing the assessment, imposition and collection of said tax of 20 cents on each $100.00 of indebtedness secured by a mortgage where the debt secured thereby does not mature within five years, while exempting from said tax all indebtedness secured by mortgage maturing within five years, and exempting from such tax all indebtedness secured by mortgages to Building and Loan Associations, is not in conflict with the provisions of the Fourteenth Amendment of the Constitution of the United States, and does not deprive plaintiff of any right secured thereby or of the equal protection of the law or authorize the taking of plaintiff's property without due process of Law.

Wherefore the appellant prays that the said judgment be reversed, and that the said Court of Appeals of Kentucky be ordered to entere a judgment reversing the judgment of the Franklin Circuit Court appealed from by the appellant to the said Court of Appeals of Kentucky and directing said Franklin Circuit Court to enter judgment in appellant's favor for the sum of $37,610.00 with interest from the filing of its petition in said Franklin Circuit Court, November 21, 1924, at the rate of 6% per annum.

Mathew O'Dougherty, Counsel for Plaintiff.

(Filed May 6th, 1926. John A. Goodman, C. C. A.)

Writ of error granted and certified this May 6, 1926.
Guy Thomas, Chief Justice of Court of Appeals of Ky.

[File endorsement omitted.]

[fol. 28] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed May 6, 1926

To the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, and to Associates Justices of the Court:

The Louisville Gas & Electric Company, the plaintiff in the above styled cause, shows by this petition to this Honorable Court, that in the records, proceedings and decisions in the Court of Appeals of Kentucky, the same being the highest Court of said State in which a decision could be had in this suit, a manifest error has occurred greatly to the damages of the said Plaintiff, the Louisville Gas & Electric Co.

That as appears in the record and proceedings there was drawn in question in this cause the validity of a Statute of the State of Kentucky known as "Section 4019a Kentucky Statutes" under and pursuant to which a tax of twenty (20) cents on each One Hundred Dollars, in all $37-610.00, was imposed upon and indebtedness of $18,805,000 secured by a certain mortgage or deed of trust of property of the plaintiff in the petition mentioned, which said tax of [fols. 29 & 30] $37,610.00 this plaintiff was compelled to pay and did pay to the State of Kentucky, as in its petition set out—the plaintiff specifically contending and claiming in said cause as shown by its petition therein, that said section 4019a Kentucky Statutes, is void because in conflict with the Constitution of the Unites States and the Constitution of Kentucky that by the levy and assessment of said tax and the coerced payment thereof to the State of Kentucky as by section 4019a Kentucky Statutes provided,

this plaintiff was denied and deprived of rights secured to it by the fourteenth Amendment to the Constitution of the United States in this; that its property was thereby taken without due process of law and that plaintiff was denied the equal protection of the law, all of which fully appears in the records and proceedings of the cause and is specifically set forth in the assignment of errors filed herein.

Wherefore petitioner prays that a writ of error be allowed and that a transcript of the record, proceedings and papers upon which said decree was rendered duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of such Court in such cases made and provided, and that the same may be by this Honorable Court imspected and corrected in accordance with law and justice.

Louisville Gas & Electric Company, by Matthew O'Dougherty, Solicitor.

Petition filed and writ granted, this May 6, 1926.

Gus Thomas, Chief Justice of the Court of Appeals of Ky.

[File endorsement omitted.]

[fol. 31] In Court of Appeals of Kentucky

[Title omitted]

Writ of Error—Filed May 6, 1926

The President of the United States to the Honorable Judges of the Court of Appeals of the State of Kentucky, Greeting:

Whereas in the record and proceedings, as also in the rendition of the judgment of the above entitled cause which is now before you or some of you, between the Louisville Gas and Electric Company, plaintiff, and W. H. Shanks, Auditor of the State of Kentucky, Defendant, your Court being the highest Court of said State having jurisdiction of the cause, there was drawn in question the right of the

plaintiff to the equal protection of the law, and the right of the plaintiff not to be deprived of its property without due process of law, rights secured to it by the Fourteenth Amendment to the Constitution of the United States claimed by it in this cause and denied to it by the judgment of the Court herein entered herein March 26, 1926, affirming the Judgment of the Franklin Circuit Court upholding the imposition of a tax in the sum of $37,610 on an indebtedness in the sum of $18,805,000 of the Appellant secured by mortgage on its property executed by it,—which said tax was imposed and exacted by Appellee from Appellant under Section 4019a Kentucky Statutes.

Appellant claimed herein that said statute was and is void because in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States, and its said claim was erroneously denied by the judgment aforesaid of March 26, 1926, affirming the said judgment of [fols. 32 & 33] the Franklin Circuit Court,—and other errors—all as set forth in appellant's assignment of errors filed herein with his petition for this writ of error, and

Whereas there is manifest error in said decision to the damage of the Louisville Gas and Electric Company, Appellant, petitioner in error,—and

Whereas we are willing that if there is error it should be duly corrected, we command you therefore, if judgment be given therein, that you send under seal of your Court, the record and proceedings in said cause to the Supreme Court of the United States together with the Writ, within such time as may be necessary in order that you may have the same at Washington on the 7 day of June 1926, that the record may be then inspected by the Supreme Court of the United States to be then and there held in order that justice may be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 6th day of May 1926.

Wilburn Phelps, Clerk United States District Court for the Western District of Kentucky. Writ allowed. Gus Thomas, Chief Justice of the Court of Appeals of Kentucky.

[File endorsement omitted.]

[fols. 34 & 35] In Court of Appeals of Kentucky

[Title omitted]

Order Allowing Writ of Error—Filed May 6, 1926

This day, May 6th, 1926, came appellant, Louisville Gas & Electric Company by Mathew O'Dougherty, its counsel, and tendered and moved to file herein its petition for writ of error from the United States Supreme Court to this Court for the reversal of the Judgment of this Court entered herein March 26, 1926, and also tendered and moved to file with said writ its assignment of errors and bond of appellee for costs that may be incurred in the prosecution of such writ; and said petition having been examined was signed by Hon. Gus Thomas Chief Justice of this Court, and the motions to file same and the said assignment of errors and bond were sustained and said bond was approved, and said petition for writ of error is now filed and allowed and on appellant's motion the Clerk of this Court is directed to make out and certify a duly authenticated copy of the record in this case as indicated in precipe including the opinion of this Court filed herein March 26, 1926, affirming the judgment appealed from herein, the petition for writ of error, assignment of errors, and bond aforesaid, and of this Order, to the United States Supreme Court.

Gus Thomas, Chief Justice, Court of Appeals of Kentucky.

[fols. 36 & 37] Bond on writ of error approved; omitted in printing.

[fol. 38] In Court of Appeals of Kentucky

[Title omitted]

Præcipe for Transcript of Record—Filed May 6, 1926

To the Clerk of the Court of Appeals of Kentucky:

The appellant, the Louisville Gas & Electric Company, having been awarded a writ of error herein by the Supreme

Court of the United States, to the Court of Appeals of Kentucky, desires the following portions of the record herein to be copied and incorporated in the transcript for the use of the Supreme Court of the United States upon said writ of error.

1. The petition of the plaintiff filed in Franklin Circuit Court, November 21, 1924.
2. The amended petition filed in said Court December 5, 1924.
3. The notice and acceptance filed December 5, 1924 and motion for writ of mandamus entered on said date.
4. The demurrer of the defendant to the petition and amended petition.
5. The judgment entered December 8, 1925, sustaining the demurrer and dismissing the petition and granting the appeal to the Court of Appeals.
6. The opinion of the Court of Appeals of March 26, 1926, affirming the judgment of the Franklin Circuit Court.

[fols. 39 & 40] 7. The judgment of the Court of Appeals of March 26, 1926, and directing mandate to issue.

8. Petition for writ of error.
9. Assignment of errors.
10. Bond and order approving same.
11. This Precipe.
12. Notice of precipe and acceptance of May 6, 1926.

Notice hereof accepted and service waived this May 6, 1926.

Frank E. Daugherty, Attorney General of Ky.

[fol. 41] Citation, in usual form, showing service on Frank E. Daugherty, filed May 6, 1926, omitted in printing.

[fol. 42] Return to writ of error omitted in printing.

[fol. 43] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed June 3, 1926

First. The points upon which Appellant will rely in the argument of this case are those stated in the Assignment of Errors, viz:

(1) That the Court of Appeals of Kentucky erred in affirming the judgment of the Franklin Circuit Court sustaining the defendant's demurrer to the plaintiff's petition and dismissing plaintiff's said petition;

(2) The Court erred in holding and adjudging that the plaintiff was not denied the equal protection of the law by the assessment and enforcement against it of the tax of $37,610 under Section 4019a Kentucky Statutes in its petition complained of;

(3) The Court erred in holding and adjudging that the plaintiff was not by the assessment and collection of said tax deprived of its property, namely $37,610.00, without due process of law;

(4) The Court erred in holding and adjudging that no right secured to the plaintiff by the Fourteenth Amendment to the United States Constitution was violated by the imposition and collection by the defendant of the tax of $37,610.00 in the petition complained of;

[fol. 44] (5) The Court erred in holding that the Statute of Kentucky known as Section 4019a Kentucky Statutes authorizing the assessment, imposition and collection of said tax of 20 cents on each $100 of indebtedness secured by mortgage where the debt secured thereby does not mature within five years, while exempting from such tax all indebtedness secured by mortgage maturing within five years, and exempting from the tax all indebtedness secured by mortgages to Building and Loan Associations, is not in conflict with the provisions of the Constitution of Kentucky, especially Section 170 thereof requiring equality and uniformity in the assessment and collection of taxes and expressly inhibiting all exemptions by the Legislature other

than those named in Section 170 of the Constitution of Kentucky;

(6) The Court erred in holding that Section 4019a Kentucky Statutes, authorizing the assessment, imposition and collection of said tax of 20 cents on each $100 of indebtedness secured by a mortgage where the debt secured thereby does not mature within five years, while exempting from said tax all indebtedness secured by mortgage maturing within five years, and exempting from such tax all indebtedness secured by mortgages to Building and Loan Associations, is not in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States and does not deprive plaintiff of any right secured thereby or of the equal protection of the law or authorize the taking of plaintiff's property without due process of law.

Second. Portions of the record to be printed are the entire record certified to the United States Supreme Court by the Clerk of the Court of Appeals of Kentucky, excepting only "Exhibit A", the printed copy of the deed of trust or mortgage from the Louisville Gas and Electric Company to the Harris Trust & Savings Bank, and the Stipulation in reference thereto executed by Counsel for Appellant and Appellee, May, 1926.

Matthew O'Dougherty, Counsel for Appellant.

[fol. 45] [File endorsement omitted.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 70

LOUISVILLE GAS AND ELECTRIC COMPANY, - - - - - - - Plaintiff-in-Error,

vs.

W. H. SHANKS, Auditor of State of Kentucky, - - - - - - - Defendant-in-Error.

BRIEF FOR PLAINTIFF.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF KENTUCKY.

MATTHEW O'DOHERTY,
Counsel for Louisville Gas and Electric Company, Plaintiff-in-Error.

ALEX. P. HUMPHREY,
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Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 388.

LOUISVILLE GAS AND ELECTRIC COMPANY, - - - - - - *Plaintiff-in-Error,*

vs.

W. H. SHANKS, AUDITOR OF STATE OF KENTUCKY, - - - - - *Defendant-in-Error.*

BRIEF FOR PLAINTIFF.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF KENTUCKY.

May it please the Court:

The judgment which the Court is asked to review and reverse in this case was rendered by the Court of Appeals of Kentucky, on the 26th of March, 1926 (Record, p. 10).

The petition for writ of error was filed and allowed May 6, 1926 (Record, p. 14).

The opinion of the Court of Appeals has not yet been officially reported, but a duly certified copy may be found on page 10 of the printed record.

By the judgment referred to the Court of Appeals affirmed a judgment of the Franklin Circuit Court (the fiscal court of Kentucky) upholding the validity

of a State statute known as "Section 4019a, Kentucky Statutes," by which a tax of 20 cents is imposed upon each $100.00 or fraction thereof of indebtedness secured by mortgage on property in Kentucky, which mortgage shall be lodged for record, where the indebtedness does not mature within five years, and exempting from the tax indebtedness secured by mortgages made to Building and Loan Associations (Record, p. 3).

The duty of collecting the tax is imposed upon the County Court Clerk of the county in whose office the mortgages is first offered for record (Appendix, p. 63).

The contention for plaintiff-in-error is that by the provisions of the statute its property, $37,610.00, the amount of the tax imposed, was taken from it "without due process of law," and that it was denied by the statute and by the judgment upholding its validity "the equal protection of the law," rights assured to it by the provisions of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF FACTS.

The plaintiff-in-error, a public service corporation having its principal office and place of business in Louisville, Kentucky, offered for record in the Jefferson County Clerk's office on November 22, 1922, a deed of trust, duly executed and acknowledged, securing an authorized issue of $150,000,000.00 bonds, of which there was to be issued forthwith $18,805,000.00, dated November 1, 1922, and due November 1, 1952.

The plaintiff paid the usual recording fee of $1.25 and ten cents for each one hundred words in excess of twelve hundred words, as provided by Section 1720, Kentucky Statutes (Appendix, p. 63), but the Clerk refused to receive or record the mortgage unless and until the appellant paid in addition a tax of 20 cents on each $100.00 of the said $18,805,000 (the initial issue of the $150,000,000 authorized) of the indebtedness secured by the deed of trust, or in all a tax of $37,610 imposed by the Revenue Act of 1915, known as Section 4019a, Subsection 9, Kentucky Statutes (Appendix, p. 63).

Appellant having made its arrangements for the issue and delivery of $18,805,000 of the bonds, the proceeds of which were to pay off and discharge prior bonds then outstanding and maturing to the amount of $14,500,000 and other maturing obligations, had no alternative but to pay the tax demanded, $37,610, or suffer great financial loss and impairment of credit, and so, although objecting to the tax, was obliged to pay and did pay it.

For such additional bonds as may hereafter be issued up to the amount named in the deed of trust, a like tax will have to be paid under the statute, amounting, in all, on the total authorized issue, to $300,000.00.

The plaintiff-in-error having demanded from the State Auditor a warrant on the State Treasurer for the return of the tax so wrongfully collected, as provided by Section 162, Kentucky Statutes (Appendix, p. 63), and the demand having been refused, instituted this proceeding in the Franklin Circuit Court for a writ of

mandamus against the Auditor to compel him to issue a warrant in plaintiff's favor for the amount named.

The petition for mandamus contained, among others, the following averments:

> "Plaintiff says that to make said bonds marketable or available to this plaintiff as a means of financing its business and meeting its financial obligations, as set out in said deed of trust, it became and was indispensably necessary under the law of Kentucky, that the said deed of trust should be placed on record in the several County Clerks' offices of the Counties in which the land and other property in said deed of trust described was located, namely, Jefferson, Ohio, Oldham, Hardin, and Meade Counties, Kentucky.
>
> * * * * * * * *
>
> "Plaintiff says that the said Clerk refused to place said deed of trust on record in his said office unless and until plaintiff paid to him in addition a tax of twenty cents on each one hundred dollars of said $18,805,000, or $37,610, in accordance with the requirements of Subsection 9 of Section 4019a of the Kentucky Statutes. Plaintiff says that it was as hereinbefore set out, indispensably necessary that said deed of trust should be immediately recorded in the Clerk's office, and that plaintiff was thus compelled to pay and did pay, under protest to the State of Kentucky, through the County Clerk aforesaid the said sum of $37,610 in excess of the lawful recording fee, as above, and said sum of $37,610 was exacted from plaintiff wrongfully and without right.

"Plaintiff says that the statute aforesaid known as Subsection 9 of Section 4019a of the Kentucky Statutes under and by which said imposition of twenty cents tax on each one hundred dollars of indebtedness where the indebtedness secured by a deed of trust or mortgage does not mature within five (5) years, was made, was and is illegal, unconstitutional, and void; that said tax is not imposed by said statute or any statute of Kentucky on any indebtedness secured by mortgage where the indebtedness so secured matures within five (5) years; that mortgages to Building and Loan Associations, of which there are a number in Kentucky, are expressly excepted from its operation; that the said statute is class legislation, discriminatory, and intended to deny, and does deny, to persons whose needs or requirements call for mortgage loans for more than five years, the equal protection of the law; that it is contrary to Section 171 of the Constitution of Kentucky and destroys the uniformity and equality in taxation required by said section and other sections of the Constitution of this State; that the classification which is attempted to be made by such statute is arbitrary, illegal, and unreasonable; that the tax by said statute attempted to be imposed on debts secured by mortgage where the indebtedness does not mature within five years is illegal, excessive, and confiscatory; that by the enforcement of said statute against this plaintiff as herein set out, and unless plaintiff is granted the relief prayed for herein the plaintiff will be denied the equal protection of the law and the rights secured to it by the Fourteenth Amendment of the Constitution of the United States, and deprived of its property

without due process of law, and plaintiff especially pleads and relies herein on the rights so secured to it under the Constitution of the United States."

A demurrer was filed and sustained to the petition, and plaintiff declining to plead further, judgment was entered dismissing the petition, and an appeal prayed and granted to the Court of Appeals.

To the judgment of the Court of Appeals affirming the judgment of the Franklin Circuit Court the writ of error is prosecuted.

LAW.

The portion of the statute assailed reads as follows:

> "A tax of twenty cents (20¢) is hereby imposed upon each one hundred dollars ($100.00) or fraction thereof of indebtedness, which is, or may be, in any contingency secured by any mortgage of property in this State, which mortgage shall be lodged for record after this act goes into effect where the indebtedness does not mature within five years.
>
> * * * * * * * *
>
> "provided, however, the provisions of this section shall not apply to mortgages executed to building and loan associations."
>
> (Subsec. 9, Section 4019a, Ky. Statutes.)

It will not be contended for the defendant-in-error that the exaction can be upheld as a tax on property, because, so regarded, it is in plain violation of the rule of uniformity in levying and collecting taxes provided

by Section 171 of the Constitution of Kentucky, but the claim will, we assume, be made here as in the State Court, that the tax is not in fact a tax on property, but a license fee for the privilege of recording the mortgage securing the indebtedness.

This is the theory upon which the State Court rested its decision as may be seen by reference to the opinion from which we quote the following:

> "By this appeal appellant attacks Section 4019a, Subsec. 9, Kentucky Statutes, as being in violation of the Fourteenth Amendment to the Constitution of the United States and of Section 3 of the Bill of Rights in Sections 170 and 171 of the Constitution of Kentucky.
>
> "The statute in question provides for the privilege of recording mortgages when the indebtedness so secured does not mature within five years a tax of 20 cents upon each $100 or fractional part thereof shall be paid, exempting from its operation mortgages to Building and Loan Associations."
>
> (Record, p. 10.)

It is quite difficult to understand such argument.

Manifestly it is not based upon the statute, which makes no mention of a "privilege tax," but in utter disregard of its language and obvious meaning.

The theory advanced violates every recognized canon of construction, one of which is embodied in a statute of Kentucky designed for the construction of statutes, and which reads as follows:

"* * * All words and phrases shall be construed and understood according to the common and approved usage of language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such meaning."

(Section 460, Ky. Statutes.)

Frankfort & Lex. Turnpike Co. v. Com., 82 Ky. 389.

The Legislature apparently did not wish to leave any room whatever for misunderstanding its meaning. That the tax authorized by the statute challenged in this case "is levied on each $100.00 or fractional part thereof of indebtedness which is secured by a mortgage on property in this State, which mortgage is lodged for record where the indebtedness does not mature within five years," is made clear by the very language of the Legislature in enacting the statute.

The statute so reads.

That it is, therefore, a property tax pure and simple, seems too clear for discussion.

The case of *Greene, Auditor,* v. *Federal Coal Company,* 184 Ky. 664, upon which counsel for defendant-in-error relied in the State Court, may be cited here to support their contention.

The case gives no support to it, but on the contrary supports that made for the plaintiff-in-error.

The constitutionality of the statute—Section 4019a, Subsec. 9, was not challenged in that case and the Court was not called upon to consider it and did not.

The Federal Coal Company sought by its petition in the Circuit Court to recover the tax paid by it to the County Clerk, $2,700.00, on the alleged ground that the payment was made by mistake of law and fact and upon the further ground that the title of the mortgagor to the property mortgaged had failed and that as a result the mortgage vested the mortgagee with no title to the property.

No other ground was relied upon or argued, either in the Circuit Court or Court of Appeals.

In reversing the judgment in that case the Court held that the evidence failed to show that the tax was paid by mistake of law or facts, that under the facts disclosed the money paid could not be recovered back. The following excerpt from the opinion in the case is valuable here.

Discussing the statute, 4019a, its purpose and effect, it is said in the opinion:

> "It will be observed that the tax is not imposed upon the mortgage by the statute, but upon the indebtedness secured by the mortgage. The instrument constituting the mortgage evidences the indebtedness, and enables the Clerk to know the amount of the indebtedness and to know the amount of tax to be collected upon the indebtedness, *the thing taxed.*"
>
> (Greene, Auditor, v. Federal Coal Co., 184 Ky. 668.)

It is not easy to see how the Court, with the statute before it, could have held otherwise with any regard for common sense or reason. Indeed, the Court re-

peated in its opinion the very language of the statute "that a tax of 20¢ is hereby imposed upon each $100.00 or fraction thereof of indebtedness, etc. * * *"

Yet, if the Court's statement be correct, as it so manifestly appears, it will not, we assume, be contended by any one that the constitutionality of the act can be upheld.

In the still later case of *Kelly* v. *New York Life Insurance Company,* 202 Ky. 789, the Court held the tax imposed by Section 4019a, Subsec. 9, Kentucky Statutes, to be a property tax, thus apparently overruling the case of *Middendorf* v. *Goodale,* 202 Ky. 124, decided some months earlier, in which the Court held the tax of 20¢ imposed on each $100.00 of the indebtedness of the mortgage to be a privilege tax. The following is taken from the opinion in *Kelly* v. *New York Life Insurance Company, supra:*

> "The tax is imposed upon each $100.00 or fraction thereof of indebtedness secured by mortgage of property in this State. * * *
>
> "The General Assembly in passing the Act did not contemplate that the tax of 20¢ on the $100 of mortgaged indebtedness should be paid upon the interest, the principal loan being subject to this, that being the whole sum due at the time the indebtedness was incurred."
>
> (*Id.,* 202 Ky. 789.)

We will hereafter discuss the opinion in *Middendorf* v. *Goodale, supra,* in which the Court held the tax in question to be a privilege tax, but it is to be observed that in two cases, decided by the same Court, one before

the Middendorf case—*Green, Auditor,* v. *Federal Coal Co., supra,* and one after the Middendorf case was decided—*Kelly* v. *New York Life Insurance Co., supra,* the Court expressly held that the tax was imposed upon the indebtedness and was therefore a property tax.

Section 171 of the Constitution of Kentucky reads in part:

> "The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

This salutary provision in its fundamental law distinguishes the Kentucky Constitution from that of some other States, where such uniformity is not required.

There is, it may be remarked, no more important provision to be found in the Constitution of the State, or one more essential to the enjoyment of the liberty, justice, and equality which its framers aimed to establish and preserve. Civil liberty without equality and uniformity in the exercise of the taxing power might become a mere mockery. Hence, it has been said, and with justifiable pride, of the judiciary of the country, that owing to its vigilance

"All attempts to avoid the application of the constitutional rule of equality and uniformity in designating the exaction imposed by an act as a privilege or license tax are disingenuous and unavailing."

WHETHER THE TAX IMPOSED UNDER A STATE STATUTE VIOLATES ANY RIGHT SECURED BY THE FEDERAL CONSTITUTION IS A QUESTION WHICH THE UNITED STATES SUPREME COURT MUST DECIDE FOR ITSELF.

That this Honorable Court will decide for itself whether the constitutional rights of the plaintiff-in-error are violated by the imposition of the tax complained of, is a proposition too plain and too well established to call for extended argument.

In *St. Louis Cotton Compress Co.* v. *State of Arkansas,* 260 U. S. 348 (67 L. Ed. 297), the Court had before it a statute of the State of Arkansas which purported to impose a liability tax of five per cent on premiums paid for insurance on property in Arkansas to companies not authorized to do business in Arkansas. The contracts were made and the premiums were paid in Missouri. The tax was upheld by the Supreme Court of the State of Arkansas and declared to be not violative of any of the constitutional rights of the plaintiff-in-error in that case.

This Honorable Court reversed the judgment.

We quote from the opinion:

"The Supreme Court justified the imposition as an occupation tax—that is, as we understand

it, a tax upon the occupation of the defendant. But this court, although bound by the construction that the supreme court may put upon the statute, is not bound by the characterization of it, so far as that characterization may bear upon the question of its constitutional effect. St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 362, 59 L. Ed. 265, 271, 35 Sup. Ct. Rep. 99. The short question is whether this so-called tax is saved because of the name given to it by the statute, when it has been decided in Allgeyer v. Louisiana, 165 U. S. 578, that the imposition of a round sum, called a fine, for doing the same thing, called an offense, is invalid under the 14th Amendment.

* * * * * * * *

"The name given by the State to the imposition is not conclusive. Bailey v. Drexel Furniture Co., 250 U. S. 20; Lipke v. Lederer, 250 U. S. 557."

(St. Louis Cotton Compress Co. v. Arkansas, *supra.*)

It is immaterial whether the characterization of the act is made by the Legislature or by the Court in construing it.

As held by this Honorable Court in *New York, Philadelphia & Norfolk Telegraph Co.* v. *Dolan,* 265 U. S. 96, 68 Law Ed. 916, the characterization of the statute is not construction, and upon the issue of constitutionality this Court must determine the nature of the tax for itself and is not bound by the characterization given to it by the State Court.

This Honorable Court has held, and with manifest reason and justice, that a tax cannot be made a license

or privilege tax by merely calling it such, that its character must be determined by its incidents.

In the case of *Dawson, Attorney General,* v. *Kentucky Distillery & Warehouse Co.,* 255 U. S. 288, the Court had before it a statute of the State of Kentucky which imposed a tax of 50 cents a gallon on whiskey to be withdrawn from bond, which was called in the statute an "annual license tax."

It was contended for the State that the tax in question was an occupation or excise tax and was authorized under Section 181 of the Constitution of Kentucky, which authorizes occupation or license taxes.

In disposing of the contention the Court said:

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents; and, obviously, it has none of the ordinary incidents of an occupation tax.
>
> * * * * * * * *
>
> "It cannot be made an occupation or license tax by calling it so. See *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 148-150, 55 L. Ed. 389, 412, 413; *Zonne* v. *Minneapolis Syndicate,* 220 U. S. 187, 55 L. Ed. 428; *United States* v. *Emery B. T. Realty Co.,* 237 U. S. 28, 58 L. Ed. 825. The language of the emergency clause of the act discloses that the legislature considered that it was, in fact, taxing the whisky. As we hold the tax to be one on property, and it is conceded that, if it be such, it is invalid under the State Constitution, we have no occasion to consider whether it would also be invalid under

the State Constitution as a license or excise tax, because confiscatory."

(*Dawson, Atty. Gen.*, v. *Ky. Disty. & Whse. Co.*, *supra.*)

As said by the Supreme Court of Kansas:

"Cases in which the courts have refused to stultify themselves respecting the true character of legislation and have pierced through speciousness to reality are numerous. In the case of *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, one of the questions was whether or not a tax on the rents or income from real estate was something different from a tax on the real estate itself and consequently not a direct tax, which the United States required to be apportioned among the several States. In the opinion it was said:

"The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment—the prohibition is not against direct taxes on land from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes—and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nominee*. The name of the tax is unimportant. The real question is, Is there any basis upon which to rest the contention that real estate belongs to one of the two

great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.

* * * * * * * *

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions can not be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus in *Brown* v. *Maryland,* 12 Wheat. 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said, 'It is impossible to conceal from ourselves, that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

"In *Weston* v. *Charleston,* 2 Pet. 449, it was held that a tax on the income of *United States* securities was a tax on the securities themselves, and equally inadmissible. * * * So in *Dobbins* v. *Commissioners,* 16 Pet. 435, it was decided that the

income from an official position could not be taxed if the office itself was exempt.

"In *Almy* v. *California,* 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Company* v. *Jackson,* 7 Wall. 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in *Cook* v. *Pennsylvania,* 97 U. S. 566, that a tax upon the amount of sales of goods by an auctioneer was a tax upon the goods sold.

"In *Philadelphia Steamship Co.* v. *Pennsylvania,* 122 U. S. 326, and *Leloup* v. *Mobile,* 127 U. S. 640, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed, and when the tax is substantially a mere tax on property and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. 'The substance and not the shadow, determines the validity of the exercise of the power.' *Postal Telegraph Co.* v. *Adams,* 155 U. S. 688-689 (pp. 580, 582)."

Wheeler v. Weightman, 96 Kansas, 50.

The Kansas Court in the case just cited had before it a statute very similar to Section 4019a, Kentucky Statutes, imposing a recording tax on mortgages. The Kansas statute, however, was much milder and less drastic than the Kentucky statute, for it imposed only a tax of

> "* * * 15¢ per annum for the full term of the loan for each $100 and major portion thereof on the principal debt or obligation which is or under any contingency may be secured by such mortgage.
>
> * * * * * * * *
>
> "provided that nothing in this act shall be construed as requiring a registration fee of more than $5,000 on any mortgage of real property. Such fee upon any such mortgage shall be paid at the time such instrument is presented for record."
>
> (Section 2, Kansas Statutes, 250, Laws of 1915, copied in 96 Kansas, 78.)

Like the Kentucky Statute it also provided that

> "Mortgages given to Building and Loan Associations as security for non-negotiable loans shall be exempt from the payment of the tax imposed by this act."

The Act is entitled "An Act relating to Registration fees for, and Taxation of, Real Estate Mortgages."

The whole subject of taxation, classification, license fees, privilege taxes, etc., is discussed at great length and with great perspicuity in the opinion of the Court.

We make the following excerpts from the opinion of the Court:

"The only limitations on the power to impose taxes of this kind are that the tax shall bear some reasonable relation to the right, privilege, or franchise taxed, that classification shall be natural and not arbitrary or capricious, and that all persons or subjects in the same class shall be treated in the same way. The character of the tax is not necessarily affected by the circumstance that it may be proportioned in the same way as the ordinary property tax.

* * * * * * * *

"If, however, the tax in fact rests on property, no matter what it may be called, it is a property tax, and courts will look through form to substance and will prevent that from being done by indirection which could not be accomplished directly.

* * * * * * * *

"The act is a revenue measure, and the tribute levied is a tax. *The so-called registration fee bears no relation, proximate or remote, to compensation for services performed or to the subject of reimbursing the State for its outlay in maintaining the office of register of deeds.* The usual registration fee charged for these purposes must still be paid. The tax is computed at a per annum rate on the amount of the principal obligation secured as a basis of value. In the beginning the tax is paid for the years the mortgage runs. If the loan be extended at maturity the same per annum rate is paid for the period of the extension. While this is called a 'renewal registration fee' there is no renewal of anything for any purpose for which records of instruments are kept. After maturity without an extension an annual tax is paid unless the debt be discharged

or foreclosure proceedings be instituted. Exemption from *ad valorem* taxes and the right to have a mortgage enforced by judgment are secured, not by recording, but by paying the tax. The tax is distributed to the various funds in the treasury precisely as other taxes are distributed and it has no office to perform except to augment the public revenues.

* * * * * * * *

"The act was patterned after the New York law of 1906, which was subsequently amended, and which in its amended form constitutes articles 11 of the tax law of that state. (5 Consolidated Laws of New York, 1909, p. 4366.) The New York law is the more elaborate. The Kansas law differs from it in details, and contains provisions not found in the model, but the general scheme and the essence and substance of the two laws are identical and in some instances words employed in the same connection are identical. *Not being obliged to contend with an obstruction in the form of a constitutional provision requiring a uniform and equal rate of assessment and taxation,* the New York legislature frankly designated the imposition which it laid a tax, and a tax on mortgages.

* * * * * * * *

"The New York act of 1906 supplanted an act of 1905 which levied a tax of five mills on the dollar, uniformly throughout the State, on the legal and equitable owners of bonds, notes, coupons, or other evidence of debt or obligations secured by any mortgage of real estate and exempted the same from local taxation. In the case of *People* v. *Trust Company of America,* 205 N. Y. 74, 98 N. E. 207, the court incidentally spoke of the

tax under the act of 1905 as a property tax and the tax under the law of 1906 as an excise tax. The distinction, however, evidently referred merely to the method of apportionment, because the legislature of New York rested under no delusion respecting the character of the act of 1906. It intended to levy and in unmistakable terms did levy a tax on mortgages as property and left no room to interpret its action as directed merely toward the civil privilege of placing mortgages on record.

* * * * * * * *

"The statutes of Michigan, Minnesota and Oklahoma are framed according to the New York scheme. In Michigan and Oklahoma, as in New York, *no constitutional impediment stood in the way.* In Minnesota the constitution was amended to eliminate a provision similar to the equality and uniformity provision of the constitution of this State so that the scheme could be adopted. In Michigan, Minnesota and Oklahoma the legislature resorted to no veiling device of phraseology and the tax is known to be what it is in fact, a special tax on a class of property.

* * * * * * * *

"Besides inducing persons who have been in the habit of employing methods to escape taxation to disclose their mortgage holdings, the legislature of this State hoped to attract more capital to the real estate mortgage business. The court expresses no opinion regarding the soundness of the policy because it has no legal concern with the wisdom or unwisdom of legislative policies. The method adopted to carry out the policy, however, is the method of the property tax. The only marked difference between the statutes of the

States referred to and the Kansas statute, barring matters of detail, is that in the latter the soothing term 'registration fee' is used instead of the rude word 'tax.' The voice is the voice of crafty Jacob, but the hands are the hands of hairy Esau, *and the court declines to be deceived by a name when it knows what everybody else knows, that the statute embodies a method now becoming common of taxing real-estate mortgages.* * * *

"* * * Consequently, the registration fee is not the mere price of the privilege to register, but is a compulsory exaction levied for revenue purposes directly upon the mortgage as such, which loses its quality of evidence and security unless the tax is paid.

"The result is that the statute undertakes to classify the property of the estate for purposes of taxation, to place real estate mortgages, or, speaking accurately, some real estate mortgages, in a class by themselves, and to subject such mortgages to a specific tax, all contrary to the express command of the constitution. This cannot be done, and the statute is void."

Wheeler v. *Weightman,* 96 Kansas, 50-78.

The Kentucky statute is equally clear. It, too, applies, not to all, but only to some real estate mortgages. It contains no "soothing term" in lieu of the rude word tax. It declares in so many words that:

"A tax of 20 cents is hereby imposed upon each $100, or fraction thereof, of indebtedness which is or may be in any contingency secured by any mortgage of property in this State, which mortgage shall be lodged for record after this act

goes into effect where the indebtedness does not mature within five years.

* * * * * * * *

"If any such mortgage includes property outside of the State such *tax* shall be imposed upon such proportion of the whole debt secured thereby as the value of the property in this State included therein bears to the whole of the property included therein. The county clerk first receiving such instrument for record shall determine the amount *of such tax from* affidavits of the mortgagor or its officers as to such proportionate value from other satisfactory evidence.

* * * * * * * *

"If a mortgage is made to a mortgagee in trust to secure the payment of bonds or other obligations to be issued thereafter, a statement may be incorporated therein of the amount and description of such obligation already issued or to be issued forthwith, *and the tax to be paid* on filing such mortgage for record or registration shall be computed upon the amount so stated. Such statement shall be binding and conclusive on all persons claiming through or under the mortgage and no additional obligation shall be issued or certified by the trustee until the additional tax thereon shall have been paid.

* * * * * * * *

"If any such mortgagor shall issue or if any such trustee shall certify or aid in the issuance of any such obligations without the payment of *the tax* as herein provided they shall each be subject to a penalty of five times the amount of such tax that should have been paid." (Kentucky Statutes, Sec. 4019.)

It is made as perfectly clear as language can possibly make it that the tax is imposed upon the entire indebtedness where all the bonds secured by the mortgage or deed of trust are issued at once, or if only a portion is issued that the tax is imposed "upon such proportion of the whole debt as is issued, or upon such proportion as the value of the property in the State covered by the mortgage bears to the whole of the property included therein."

Nowhere in the statute is it said that the tax is upon the privilege of recording the mortgage or that it is to be regarded as a license or privilege tax. "Indebtedness" is property and the tax levied thereon must necessarily be a tax on property.

Section 4022 of the Kentucky Statutes reads:

> "For the purpose of taxation real estate shall include all lands within this state and improvements thereon; and personal estate shall include every other species and character of property—that which is tangible as well as that which is intangible."
>
> (Ky. Statutes, Sec. 4022.)

It is, we submit, impossible to distinguish this case from the Kansas case, Wheeler v. Weightman, *supra,* and for like reasons the statute in this case is void.

The sophistry involved in the argument which was made in the court below and may be repeated here, that the tax of twenty cents imposed upon each One Hundred Dollars or fraction thereof, of indebtedness is a privilege tax or license tax, has been clearly exposed

and as clearly condemned by this Honorable Court in a recent case which will be found to cover almost every question involved herein, and to support the appellant's right to the relief prayed for.

The case referred to is that of the *Federal Land Bank of New Orleans* v. *Crossland, Judge,* 261 U. S. 374 (67 L. Ed. 703).

We quote from the opinion:

> "This is a petition for a writ of mandamus to require the recording officer of Montgomery County, Alabama, to record a first mortgage deed on receiving the fee for recording the same, without payment of an additional sum of 15 cents for each $100 of the principal sum secured. The General Revenue Act of the State, approved September 15, 1919, by §361, Schedule 71 (377), provides that no mortgage shall be received for record 'unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record, to wit, * * * upon all instruments which shall be executed to secure an indebtedness of more than $100 there shall be paid the sum of 15 cents for each $100 of such indebtedness, or fraction thereof, which is secured by said mortgage * * * to be paid for by the lender, and no such paper shall be received for record unless there is filed therewith a certificate that the privilege tax was paid by the lender.' Any probate judge who shall receive a mortgage without collecting the 'recording or registration tax,' etc., is made guilty of a misdemeanor and punished.
>
> * * * * * * * *

"The tax was sustained by the Supreme Court of the State, and the petition for mandamus was ordered to be dismissed on the ground that the payment was optional; that the Federal Land Bank was not required to put its deed on record, and that, if it did, it must pay whatever others were required to pay for the registration of its security. But the case is not quite so simple as that. The law of Alabama does make it practically necessary to record such deeds, because it overrides them if not recorded, in favor of any purchaser without notice. While it does so, it cannot say that it leaves the bank free to (378) record or not. The bank has a choice, it is true, but so has one who acts under duress. The Eliza Lines, 199 U. S. 119, 131, 50 L. Ed. 115, 25 Sup. Ct. Rep. 8, 4 Ann. Cas. 406.

"*The State is not bound to furnish a registry, but if it sees fit to do so, it cannot use its control as a means to impose a liability that it cannot impose directly, any more than it can escape its constitutional obligations by denying jurisdiction to its courts in cases which those courts are otherwise competent to entertain.* Kenney v. Supreme Lodge L. O. M., 252 U. S. 411, 64 L. Ed. 638, 640, 10 A. L. R. 716, 40 Sup. Ct. Rep. 371. It is not necessary to cite cases to show that an act may become unlawful when done to accomplish an unlawful end.

"Of course, the State is not bound to furnish its registry for nothing. It may charge a reasonable fee to meet the expenses of the institution. But in this case the legislature has honestly distinguished between the fee and the additional requirement that it frankly recognizes as a tax. *If*

it attempted to disguise the tax by confounding the two, the courts would be called upon to consider how far the charge exceeded the requirement of support, as when an excessive charge is made for inspecting articles in interstate commerce. D. E. Foote & Co. v. Stanley, 232 U. S. 494, 58 L. Ed. 698, 34 Sup. Ct. Rep. 377. But it has made no such attempt. It has levied a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it. In doing so, by the construction given to the statute by the Supreme Court, it has included mortgages that it is not at liberty to reach. *The characterization of the act by the Supreme Court, as distinguished from the interpretation of it, does not bind this court.* St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 362, 59 L. Ed. 265, 271, 35 Sup. Ct. Rep. 99; St. Louis Cotton Compress Co. v. Arkansas, Dec. 4, 1922 (260 U. S. 346, *ante,* 297, 43 Sup. Ct. Rep. 125). It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference. The statute says that the lender must pay the tax; *but, whoever pays it, it is a tax upon the mortgage* (379), and is what is forbidden by the law of the United States." (Italics ours.)

(Federal Land Bank of New Orleans v. Crossland, Judge, 261 U. S. 374 (67 L. Ed. 703).)

The logic of the opinion is, we submit, unanswerable, and seems conclusive of plaintiff's right to the relief here prayed for.

IF ALL OTHER OBJECTIONS WERE WAIVED, THE EXEMPTION GIVEN BUILDING & LOAN ASSOCIATIONS AND GIVEN TO ALL LOANS MATURING WITHIN FIVE YEARS WOULD RENDER THE ACT VOID.

As heretofore pointed out, Section 4019a imposes a tax of twenty cents on each $100.00 of indebtedness secured by a mortgage which does not mature within five years, while indebtedness so secured by mortgage which matures within five years, regardless of the amount thereof, is exempt. There is, in addition, especially and expressly exempt from the tax by the statute imposing it * * * all indebtedness to Building & Loan Associations, regardless of the amount of the indebtedness or the term in which it is to mature, whether five years or fifty years.

The exemption found in the statute reads:

> "Provided, however, the provisions of this section shall not apply to mortgages executed to building and loan associations."
>
> (Subsec. 9, Sec. 4019a, Ky. Statutes.)

Can such a law be upheld? Upon what ground can it be argued that the act imposing such an enormous tax upon the appellant and others in like situation while exempting building and loan associations and all mortgage indebtedness maturing within five years, does not deprive the appellant of the equal protection of the law, guaranteed by the Fourteenth Amendment of the Federal Constitution?

The power of the Kentucky Legislature to exempt property from taxation is limited by Section 170 of the State Constitution, which expressly enumerates the "property which shall be exempt from taxation," and in addition expressly declares that

> "All laws exempting or commuting property from taxation other than the property above mentioned shall be void."
>
> (Constitution, Section 170.)

The section reads:

> "There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments, and the income of such property as is used exclusively for their maintenance, all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; household goods and other personal property of a person with a family, not exceeding two hundred and fifty dollars ($250.00) in value; crops

grown in the year in which the assessment is made, and in the hands of the producer; *and all laws exempting or commuting property from taxation other than the property above mentioned shall be void.* The general assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location. (See Sec. 4026, Kentucky Statutes.)"

(Section 170, Constitution of Kentucky.)

No language could be plainer.

Indeed before the adoption of the present Constitution and when there was no constitutional provision enumerating the property exempted from taxation or expressly denying to the Legislature the power to grant any other exemption, the Courts of Kentucky held that no exemption by the Legislature except in consideration of public service, could be validly made, and so Section 170 of the Constitution may be regarded as but declaratory of a long-recognized fundamental principle—an affirmance by the people of the Court's repeated rulings on the subject.

Thus, in *Barbour, Sheriff,* v. *Louisville Board of Trade,* 82 Ky. 647, the Court held void an act of the Legislature exempting from taxation real estate of the Board of Trade in the city of Louisville, although the exemption granted had for its object the fostering of commerce. We quote from the opinion:

"The power of taxation grows out of the necessity to preserve the government by laying a com-

mon burden upon every citizen enjoying its protection of life, liberty and property, and is limited in its nature to objects that are public, as distinguished from those that are personal or private in their character.

* * * * * * * *

"The constitution provides that the grant of an exclusive or separate privilege must be supported by the 'consideration of public service.' That consideration must be either past, present or future. There is no pretense of a past or present consideration. If it is future, it must be prescribed in the act of incorporation. We find no duties prescribed there that could support a contract. The powers granted are mere gratuities, to be exercised at the pleasure of the company, and if they were imperative they are not public in their nature. The gathering and dissemination of commercial information, and the making and enforcing rules for the conduct of business men in the city of Louisville, may be incidentally beneficial to the city as well as to the State at large, but those things are not public duties or public services within the meaning of the Constitution.

* * * * * * * *

"Appellee may perform a service that is directly beneficial to the local public of the city of Louisville, but the existence of such benefit would not authorize a tax upon all the people of the Commonwealth to foster such an enterprise. The exemption of this corporation from State taxation is a tax, to that extent, upon every citizen of the Commonwealth, as every other citizen must help to bear the burden thus lifted from the corporation.

"As a general rule, the test of the right to exempt property is the existence of the right to levy a tax to foster such property. The levy of a direct tax upon the whole people of the State, to be paid to this corporation to forward the objects stated in their charter, would be declared at first blush unconstitutional, and yet that is what is indirectly done by this exemption.

* * * * * * * *

"It is not every enterprise that is incidentally beneficial to the public that will authorize the State to foster it at the expense of the people at large. The object must appear upon the face of the legislation to be directly for the public good, and of such a character as to call for the aid of the State to forward it in the exercise of a governmental function. The building up in Louisville of any extensive manufactures would be of an incidental benefit to the people of the whole State, but no one would suppose for a moment that the whole State should contribute to it.

* * * * * * * *

"Every citizen is entitled to equal rights and equal privileges with every other citizen. In entering into the social compact called government, he stipulates to bear only his proportion of the common burden of taxation, and when more is imposed upon him his property is taken against his consent and without consideration, it is spoliation. The exemption of charitable institutions and schools has always been recognized as valid, because done in the exercise of a governmental function; but private undertakings, primarily for private gain or aggrandizement in any way, cannot be protected individually and specifically by the

> government, but must come under general laws that operate alike upon all."
>
> (*Id.*, 82 Ky., pp. 652-3-4-5.)

The doctrine announced in *Barbour, Sheriff*, v. *Board of Trade, supra,* was followed and emphasized by the Court in *Clark, Sheriff*, v. *Louisville Water Company,* 90 Ky. 518.

By an act of the Legislature the property of the Louisville Water Company was exempted from taxation.

The act fixed the duty on the Water Company to furnish water to the public fire cisterns and public fire plugs, or hydrants, of the city of Louisville, for fire protection free of charge.

It was recited in the act that the stock of the Company was owned by the Sinking Fund of the city of Louisville and so owned by the city of Louisville.

> "* * * therefore the Louisville Water Company is hereby exempted from the payment of taxes of all kinds, of whatsoever character, State, municipal or special."

Judgment of the lower Court upholding the exemption was reversed. We quote from the opinion:

> "As the language of the act in this case is plain, it becomes the delicate duty of this court, keeping in mind the presumption in favor of legislative action, to determine whether, in its enactment, the legislature has gone beyond the constitutional limit.

"The first section of our Bill of Rights provides that 'no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services.'

"The appellant contends, first, that if it were true the Legislature was moved to the passage of the act upon the idea of the rendition of a public service, yet, in fact the company renders no such public service, as the Constitution contemplates, and, second, that this was not the reason for its enactment, and that it is altogether unsupported by any valid consideration, or such as the Constitution recognizes.

"We shall pass by the question whether the rendition of a *local* public service, as to furnish the city of Louisville with water, is a valid consideration for an exemption from State taxation, thereby imposing an additional burden upon all the balance of the people of the State, or whether it is a governmental duty of the State to furnish to a city water for fire protection and sanitary purposes free of charge, either by direct taxation upon all the people of the State, or indirectly by an exemption from taxation in favor of the one doing so; and if so, being, therefore, a valid consideration for such an exemption.

* * * * * * * *

"In short, the city in its private and not its governmental character owns the stock and property of the water company, and this ownership is not necessary to the execution of its duties as a political or governmental power. This being so, it stands upon the same footing as would any individual or body of persons if like privileges had been

conferred upon them, and cannot be constitutionally exempted from State taxes save in consideration of public services. The fact that the furnishing of the water may incidentally protect from fire the public buildings of the State will not support the exemption. The privilege was not conferred, as the legislature declared, and as we have otherwise shown, for governmental purposes, but merely for a reason which will not support it. It arose out of considerations relating to the private and pecuniary advantage of the city, and in which the State at large had no interest."

(*Id.*, 519, 520, 522, 523.)

Judge Prior, who dissented, took the view that the Water Company was required to render a public service and that the exemption should therefore be upheld. In his dissenting opinion so holding, he states the general rule with great clearness:

"It is the settled doctrine of this State that no exemption of one's property from taxation is valid where like property of another is taxed unless the exemption proceeds from the consideration of public service."

(*Id.*, 90 Ky. 525.)

Other cases in line with those cited are:

Commonwealth v. *Masonic Temple Co.*, 87 Ky. 349.
City v. *Bellevue Water Co.*, 119 Ky. 714.
Commonwealth v. *Makibben*, 90 Ky. 384.

OVER AND OVER AGAIN THE COURT OF APPEALS HAS HELD THAT NO EXEMPTIONS CAN BE GRANTED TO BUILDING AND LOAN ASSOCIATIONS.

In *Gordon* v. *Winchester Building, &c., Association*, 12 Bush, 110, the Court, by a unanimous opinion held that such an association renders no public service which could uphold a special grant of exemption to it. The general law at the time forbade the charging of usurious interest under penalty of forfeiture of all the interest on the indebtedness. By an act of the Legislature the Winchester Building & Loan Association was granted the privilege of charging more than the legal rate of interest allowed to others. The Court held the act void as in conflict with the spirit of the Constitution because it granted to the association a special privilege without the consideration of public service.

The following is from the opinion of the Court of Appeals in the case:

> "The first section of an act approved March 14, 1871, and commonly called the conventional interest law, provided that it should be lawful for all persons to contract, by memorandum in writing, signed by the party or parties chargeable thereon, to pay or receive any rate of interest for the loan or forbearance of money which might be agreed upon by the parties to such contract, not exceeding $10 upon $100 for a year, * * *
>
> "It is therefore clear, upon the facts stated in the answer, that, tested by the general law, the

note sued on contains usury, and the interest exceeding six per cent has been forfeited, and that the demurrer should have been overruled.

"But the appellee's charter contains a provision which, if constitutional, will take the contract in this case out of the operation of the provisions of the General Statutes, and relieve it from the taint of usury.

"Section of the charter reads as follows, viz.: 'The object of said association being to enable its members, by their savings and accumulations, to acquire homes and other property, its business shall be to loan its capital stock as paid in and the accumulations thereof upon such security as may be required by the president and directors, preference being given in all cases to the members of said association; and said loans shall be made at such rate of interest as may be agreed upon by the parties thereto, *together with such premiums therefor as may be offered by the parties to whom the loans may be made.*'

"Appellants' counsel insists that that portion of the section, *supra,* which we have placed in italics is unconstitutional, and whether he is correct in this is the only question in this case.

"As the rate of interest which might be lawfully contracted for has all the while been prescribed by a general law, and all persons have been prohibited under a penalty of the forfeiture of all interest, from charging a greater rate than ten per cent per annum, the question is, had the general assembly power under the constitution, by a special act, not only to relieve the appellee against the penalty imposed upon all others for exceeding the prescribed rate, but also to empower it to en-

force its contracts for more than the rate others were permitted to charge?

* * * * * * * *

"It is our boast that under our government none are entitled to exclusive rights, but that all are governed by equal laws, subject to like burdens, and entitled to equal privileges. Yet if that portion of appellee's charter under consideration is a legitimate exercise of legislative power, that equality which has been supposed to exist is enjoyed by sufferance at the will of the legislature, and is not secured as a right by the fundamental law.

"The first section of the Bill of Rights incorporated into the constitution declares 'that all freemen, when they form a social compact, are equal, and that no man, or set of men, are entitled to exclusive, separate public emoluments or *privileges* from the community, but in consideration of public services.

"The appellee has not undertaken to render any public services, and is not bound to render any, and by an express provision of its charter is bound in making loans to give preference to its shareholders.

* * * * * * *

"But when they (the Courts) can see that the grantee of an exclusive privilege has come under no obligation whatever to serve the public in any matter in any way connected with the enjoyment of the grant, it is their duty to pronounce the grant void, as contravening that provision of the Bill of Rights which prohibits the granting of exclusive

privileges except in consideration of public services."

(Gordon, &c., v. Winchester Bldg., &c., Assn., 12 Bush, pp. 111-2-3-4-5.)

The ruling in the case of *Gordon* v. *Winchester Building & Loan Associations,* 12 Bush, 112, was expressly followed in several other cases involving the very same question. See:

Simpson v. Kentucky Citizens B. & L. Assn., 101 Ky. 496;
Mutual Savings & Loan Assn. v. Owings, 19 Ky. L. Rep. 1325;
Loughrain v. U. S. Savgs. & Loan Co., 19 Ky. L. Rep. 1984;
Henderson Bldg. & Loan Assn. v. Johnson, 88 Ky. 191;
The Safety Bldg. & Loan Assn. v. Echler, 106 Ky. 115;
Forwood v. Newbern's Assignee, 106 Ky. 293.

The ruling was also commented upon and approved in—

Barbour, Sheriff, v. Louisville Board of Trade, *supra.*

As before said, these cases were all decided before the adoption of the present Constitution, wherein for the first time the Legislature is expressly prohibited from granting any exemption from taxation other than those named in Section 170.

The argument advanced by counsel for defendant-in-error that the building and loan associations now in existence differ in any essential from that before the Court in *Gordon* v. *Winchester Building & Loan Asso-*

ciation, 12 Bush, 112, or in any of the other building and loan association cases cited, is without foundation.

Building and loan associations, like other corporations, are organized and conducted for the benefit of their stockholders only. That they serve a good purpose may be true.

The same may be said of insurance companies and of various fraternal organizations throughout the State. But there is *no duty to the public imposed* by law upon building and loan associations, and in the absence of such duty and of its performance, there can be no basis for granting an exemption or privilege.

It is needless, we are sure, to argue that the right of a mortgagee of giving constructive notice to all the world by public record of the existence of his lien, which is essential to the enjoyment of the property right created by the mortgage, *is a civil right,* an essential part of the property itself assured by law and can not be denied to one, except upon the payment of an enormous tax, and granted to another, without violating the principle of uniformity and equality required by Section 171 of the State Constitution and secured by Section 3 of the Bill of Rights, and without denying to the holder of such mortgage "the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States."

By Section 496, Kentucky Statutes, it is provided that "no deeds of trust, mortgages—or conveyance of a legal or equitable title to real or personal estate shall be valid against a purchaser for valuable consideration without notice thereof, or against creditors, until

the deed of trust or mortgage shall be acknowledged or proved and lodged for record."

This Honorable Court in *Federal Land Bank* v. *Crossland, supra,* has exposed the hollowness of the argument that the payment of the tax under such circumstances is *voluntary* in any proper sense.

MIDDENDORF v. GOODALE, 202 KY. 118.

It will be seen by reference to the opinion of the Court of Appeals (Record, p. 10) that the Court based its decision in this case on its ruling in *Middendorf* v. *Goodale,* 202 Ky. 118.

No other authority is referred to and no other reason for the Court's ruling is advanced than those found in the opinion in that case. We must, therefore, call the Court's attention to some manifest errors due, we may assume, to oversight, which appear in the opinion in the case last named.

Confronted with its ruling in the earlier case of *Greene, Aud.,* v. *Federal Coal Company,* 184 Ky. 664, in which it is expressly held that the tax imposed by Section 4019-a, Kentucky Statutes, is a property tax; and that, if so, it must be held to be unconstitutional, the Court disposed of the objection by saying that the statement in that case was inadvertently made and held that the tax is not a tax on the indebtedness secured by the mortgage or deed of trust, as declared in the statute, but is a tax on the privilege of recording the mortgage—something not even hinted at in the statute. The Court then proceeded to dispose of the objection to the exemption found in the statute and which, unless

authorized, would render the statute void, no matter what the nature of the tax.

The Court evidently regarded this as the most important question in the case, as will appear from the following excerpt taken from the opinion:

> " * * * So the important question to be determined is whether a provision contained in the last clause of the section of the statute in question by which mortgages executed to Building and Loan Associations are exempted from the tax imposed by the previous provision thereof, is a reasonable *classification* or regulation not prohibited by the State or Federal Constitution, or should be declared an artificial or capricious one violative of both of those instruments, as insisted by the appellee."
>
> (*Middendorf v. Goodale,* 202 Ky. 123.)

It seems quite plain that the Court overlooked the express inhibition on the power of the Legislature contained in Section 170 of the State Constitution, as well as the long line of cases beginning with that of *Gordon* v. *Winchester Building and Loan Association, supra,* followed by six other building and loan association cases cited above and which were approved in other cases, in which the Court expressly held that the grant of a special privilege or exemption to a building association cannot lawfully be made by the Legislature under the Constitution of Kentucky.

We have a right to believe that the cases were overlooked, since no reference whatever is made to them in the Court's opinion, and we can conjecture no other

reason or excuse for the omission; or are we left to conjecture that the Court meant to uphold the exemption by calling it a "classification."

As to the cases cited in *Middendorf* v. *Goodale, supra,* as sustaining the conclusions therein reached, viz.:

State Bank v. Board of Revenue, 91 Alabama, 862;
Pocahontas, &c., v. Commonwealth, 113 Virginia, 108;
Union Trust Company v. Common Council of Detroit, 170 Michigan, 692,

we beg to submit that the cases are readily distinguishable from that before the Court.

(1) Neither the Alabama nor the Virginia statute contains any exemptions or exceptions. The tax is assessed upon all mortgages, so that neither statute was open to the charge of discrimination or want of uniformity or equality. The contention made against the statute in the Alabama case was that the Legislature had no right or power to exempt indebtedness secured by mortgage, which paid the recording tax, from the ad valorem tax assessed against indebtedness not so secured.

The Court held that the debts secured by mortgage formed a distinct class and that under the law of Alabama the Legislature had the right to impose the recording tax on that class of property in lieu of the ad valorem tax.

It will be observed that here the attempt is to impose the recording tax in addition to the ad valorem tax, to which all property is subjected in Kentucky,

thus producing in case of mortgage securities maturing in five years or more from date double taxation of the same property.

We are quite willing to accept the statement of law found in the following excerpt from the opinion in the Alabama Court in the case:

> "There is however a distinct line of cleavage between debts which are secured by mortgages and debts which are not so secured. * * *
>
> "Whenever the legislature levies a tax on property the rate must be in exact proportion to the value of such property, and if a tax is imposed on a species of property all property belonging to that species must be taxed at the same rate whether it belong to an individual, an association of persons, or to a private corporation."
>
> (*State* v. *Alabama Fuel Co.*, 66 Sou. Rep. 175.)

It is plain, therefore, that under the Alabama law all debts secured by recorded mortgage would constitute one class and that no discrimination among members of one class will be tolerated, just as Section 171 of the Kentucky Constitution requires that "taxes shall be uniform upon all property of the same class."

As already pointed out, the Virginia statute, providing for a recording tax, contained no exception or exemption, as said in the opinion of the Court:

> "The rate of taxation is the same in all cases."
>
> (Pocahontas Collieries Co. v. Commonwealth, 113 Va. 118.)

It is not very evident how such statutes wherein no discrimination was made or attempted, or the rul-

ings of the Court thereon, can be construed as lending support or sanction to the validity of a statute which not alone exempts from its operation all mortgages made to building and loan associations but also exempts all mortgages where the debt secured matures within five years, *thus* palpably and obviously aiming, as alleged in the petition for mandamus, to reach and penalize those corporations whose financial requirements imperatively demand, as the Court must judicially know, that the securities issued by them shall run for a much longer term than five years, usually fifteen to thirty years, and often longer.

It is not too much to say that a corporation compelled to re-finance its securities—a very expensive operation—every five years, would not last long.

It does not appear in the Court's opinion in the Middendorf case that its attention was called to the fact that Michigan is in a class with New York, Oklahoma, and some other States where, as said by the Kansas Supreme Court, there are "no constitutional impediments restricting the power of the Legislature to grant exemptions." (Wheeler v. Weightman, 96 Kansas, 50.) We quote:

> "The Statutes of Michigan, Minnesota and Oklahoma are framed according to the New York scheme, *no* constitutional impediment stood in the way. In Minnesota the constitution was amended to eliminate a provision similar to the equality and uniformity provision of the constitution of this State so that the scheme could be adopted. In Michigan, Minnesota and Oklahoma the legisla-

ture resorted to no veiling device of phraseology, and the tax is known to be what it is in fact, a special tax on a class of property."

(*Id.*, 96 Kansas, 50.)

CLASSIFICATION.

In the Middendorf case after deciding that the tax under Section 4019a, Kentucky Statutes, was a tax on the privilege of recording the mortgage and not a tax "on the indebtedness" secured by it, as the statute itself declares, the Court proceeds:

> "As the correctness of our conclusion that the mortgage recording tax in question is a privilege tax is, we think, sustained by the reasons stated and authorities cited in support thereof, the only question that remains to be determined is, whether it was competent for the Legislature, in enacting the statute imposing the tax, to classify the persons availing themselves of the privilege of putting to record mortgages securing indebtedness, by requiring of some of them payment of the tax, and exempting others from its payment. That the Legislature possessed and may exercise such power the authorities all agree, but in order for the legislation to be valid, the classification must be a reasonable one and the law be made to apply alike to all persons in the class against which it is directed."
>
> (*Middendorf* v. *Goodale,* 202 Ky. 132.)

The Court further on in the opinion compares the tax in question with the inheritance tax and argues that because different rates of inheritance taxes are

imposed upon [redacted] heirs, regulated and classified by their degree of kinship with the deceased owner, the attempted classification on the privilege of recording mortgages may be regulated by the maturities of the bonds they are given to secure, and that it does not in such case militate against the "uniformity" of the tax that mortgages to building and loan associations and all mortgages maturing in less than five years from date are exempted from the tax by the statute.

The reasoning is, we think, faulty. The Court appears to have overlooked the fact that the right to inherit is a purely statutory right, and that the Legislature which creates the right, basing it on the relationship to the deceased of the different classes allowed to inherit, may regulate it by limiting it or abolishing it *in toto*. The same is true of the power to dispose of an estate by will. By a late Act of the British Parliament persons as remote as second cousins are cut off entirely from the right of inheriting.

The inheritance tax statute but recognizes and follows a classification which has its foundation in natural law.

There is manifestly a wide difference between the natural claim of a widow or child of a deceased person and that of his remoter kindred, or a mere stranger. The question is very elaborately and most ably discussed in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 288. We quote:

> "The constitutionality of the taxes has been declared, and the principles upon which they are

based explained in *United States* v. *Perkins,* 163 U. S. 625, 628.

* * * * * * *

"It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation.

* * * * * * *

" 'Clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition,' said Mr. Justice Bradley in *Bell's Gap R'd Co.* v. *Pennsylvania,* 134 U. S. 232-240 (33:892-896).

* * * * * * *

"There are three main classes in the Illinois statute, the first and second being based, respectively, on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. The latter is again divided into four subclasses dependent upon the amount of the estate received. The

first two classes, therefore, depend on substantial differences, differences which may distinguish them from each other and them or either of them from the other class—differences, therefore, which 'bear a just and proper relation to the attempted classification'—the rule expressed in the *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis, supra.* And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates 'equally and uniformly upon all persons in similar circumstances."

(*Magoun* v. *Ills. Tr. & Svgs. Bk., supra.*)

That the difference in relationship of heirs or devisees bears a just and proper relation to their classification and therefore is not arbitrary or unreasonable, seems too plain for argument. Such a statute, we respectfully submit, bears not the slightest resemblance to that complained of in this case, where it may be said that the tax is directly and intentionally made unequal and the legislation is manifestly hostile to corporations whose financial necessities require that bonds given for needed funds shall run more than five years.

It is well settled, as stated by this Honorable Court, that:

"* * * The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the

attempted classification—and is not a mere arbitrary selection."

(*Gulf, Colorado & Santa Fe R. R.* v. *Ellis,* 165 U. S. 150.)

Quoted with approval in *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 293; Stebbins v. Riley, 268 U. S. 137-146, 69 Law Ed. 456.

"No new doctrine was announced in Stebbins v. Riley, 268 U. S. 137. A classification for purposes of taxation must rest on some reasonable distinction."

(Schlesinger v. Wisconsin, Ad. Sheets U. S. Mch. 1, 1926 (70 Law Ed.), p. 301.)

Will any one be heard to say that a mortgage bond for $10,000, maturing in four years and eleven months, is of a different class of property from a bond for a like sum maturing in five years, and that the latter may be taxed while the former is exempt? Is not such attempted classification in point of fact, no classification at all, but an attempt to arbitrarily impose a burdensome tax on a species of property while exempting other property of the class from the entire burden.

If it could be granted that the Legislature under Section 171 of the Kentucky Constitution may divide the same species of property into two classes for taxation, it would by no means follow that it could impose a tax upon one of such classes and exempt the other when such exemption is expressly prohibited by the same Constitution, Section 170.

NO RATIONAL FOUNDATION FOR SUCH CLASSIFICATION.

Bonds maturing less than five years after date may be allowed to run and the lien securing them can be enforced by suit instituted within fifteen years after their maturity. There is no essential difference between such bonds or the remedies for their enforcement and those maturing five years or more from their date.

Wise v. Wolf, 120 Ky. 263.
Hemingway v. Long, 23 R. 1757.

> "There can be no lack of uniformity or discrimination in the imposition of taxes upon property in the same class, and when there has been no classification the strict rule of uniformity obtains now as it did before the amendment."
>
> (Raydure v. Board of Supervisors, 183 Ky. 97.)

Before the adoption of Section 4019a, Kentucky Statutes, as now, all bonds, etc., without regard to their maturity, were subject to the same rate of taxation. The annual tax on all bonds is now fifty cents on each one hundred dollars of value. They are obviously one class of property and so treated.

(See Chap. 116, p. 402, Acts of 1924—Appendix, p. 65.)

So that under the statute complained of it is plain that bonds, other than those of building and loan associations, running five years or more secured by mortgage would be subject to double taxation, while all bonds to building and loan associations, regardless of

amount or of maturity, and all bonds maturing in less than five (5) years would be subject only to the ordinary tax of fifty (50c) cents on each $100.00.

That the attempted classification is arbitrary and unreasonable is, we think, quite clear.

> "The classification must be on some reasonable basis, and the law when enacted must apply to all engaged in the same business. Thus an Act requiring a license from plumbers is void if it exempts certain plumbers from its operation."
>
> State v. Gardner, 58 Ohio St. 599.
>
> "A statute limiting the amount of charges to be made by a corporation based simply on the quantity of business, without limiting the charges to be made by other similar corporations doing a smaller business, is void."
>
> Cotting v. Godard, 183 U. S. 79.

EVEN IF THE TAX IMPOSED BY THE STATUTE COULD BE HELD TO BE A LICENSE OR PRIVILEGE TAX ONLY, THE CONSTITUTIONAL OBJECTION THAT THE STATUTE VIOLATES THE REQUIREMENT OF EQUALITY AND UNIFORMITY WOULD REMAIN.

In *Hager, State Auditor,* v. *Walker, &c.,* 128 Ky. 1, the Court declared an act of the Legislature void which imposed a license fee of twenty-five dollars per annum on real estate agents doing business in cities of the first, second, and third class, and a license fee of ten dollars per annum on real estate agents doing

business in cities of the fourth class, on the express ground that the statute violated the rule of uniformity which as far as practicable must be observed in the imposition of all taxes for revenue purposes only, and where the police power of the State is not involved.

While holding that Section 171 of the Constitution may not apply directly or specifically to license fees that may be levied on franchises, stock used for breeding purposes, trades, occupations and professions mentioned in Section 181, the Court said:

> "Yet it (Section 171) is entitled to serious consideration as indicating a purpose that all laws imposing taxes shall operate in a uniform manner to the end that no favoritism can be shown or discrimination be practiced."
>
> (*Hager, State Auditor,* v. *Walker,* 128 Ky. 1.)

We quote further from the Court's opinion in the case:

> "The authority to impose these special taxes does not carry with it the right of discrimination and exemption in any class that is dealt with.
>
> * * * * * * * *
>
> "If a few or any number of persons less than all who follow a designated trade, occupation or profession may be exempt while the others are taxed, the law imposing the tax would not be general but special or local and forbidden by Sections 59 and 60 of the Constitution.
>
> "This construction is in harmony with the dominant spirit of the Constitution, which provides

for uniformity in almost every subject it treats of, among which may be noticed the following, where the idea of uniformity has been carried to its fullest extent, as in the jurisdiction, number, and character of courts, as well as the trial of causes; in everything pertaining to the enactment of laws; the punishment of crimes; the regulation of elections; the creation and division of counties, the fees and compensation of public officers; the establishment, government, and classification of cities and towns; the amount of indebtedness that municipalities may create or incur; the regulation and control of railroads, common carriers, and public corporations generally.

* * * * * * * *

"We believe that the fundamental idea of taxation is that the burdens shall be borne equally and alike by all persons, and that no one class shall be taxed for the benefit of another, or one class discriminated against to the advantage of another, or an exemption allowed one that is not conceded to another. If the General Assembly has power to tax real estate agents living in cities of the first, second, third, fourth, and fifth class, and towns of the sixth class, and to exempt all who do not live or do business in these cities and towns, it has the power to further select and classify by exempting those who live in towns of the sixth class; and it would be difficult to draw the line between its power to tax and exempt, or to tax in such an unequal manner as that it would be equivalent to gross discrimination, if not exemption.

* * * * * * * *

"In the Constitution adopted in 1850, and that remained in effect until the adoption of the present

Constitution in 1891, the Legislature was left free from constitutional restraint in the matter of taxation. There was no limitation whatever upon its power. Indeed, it is a curious fact that the word 'taxation' is not mentioned in the old Constitution, nor does the word 'revenue' appear, except in the section requiring that 'all bills for raising revenue shall originate in the House of Representatives.' Yet in the early case of City of Lexington v. McQuillan, 9 Dana, 513, 35 Am. Dec. 159, decided in 1840, and under a Constitution that was also silent upon this question, the court laid down the following principles that have been accepted without question as sound from that day to this: 'When shall a tax be levied? to what amount? shall it be a capitation or property tax? direct or indirect? ad valorem or specific? and what classes of property are the fittest subjects of taxation?—are all questions wisely confided by our Constitution to the discretion of the legislative department. * * * But in some other respects, and so far as the power of taxation may be effectual without being thus limited, it is, in our judgment, limited by some of the declared ends and principles of the fundamental law. Among these political ends and principles, equality, as far as practicable, and security of property against irresponsible power, are eminently conspicuous in our State Constitution. An exact equalization of the burden of taxation is unattainable and Utopian. But still there are well-defined limits within which the practical equality of the Constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative power. Taxation may not be universal; but it must be general and uniform.

Thus, if a capitation tax be laid, none of the class of persons thus taxed can be constitutionally exempt upon any other ground than that of public service; and, if a tax be laid on land, no appropriated land within the limits of the State can be constitutionally exempted, unless the owner be entitled to such immunity in consequence of public service. The Legislature, in the plentitude of its taxing power, cannot have constitutional authority to exact from one citizen, or even one county, the entire revenue for the whole Commonwealth. * * * And, although there be a discrimination in the subjects of taxation, still persons in the same class and property of the same kind must generally be subjected alike to the same common burden. This alone is taxation, according to our notion of constitutional taxation in Kentucky.

"In *Bullitt* v. *City of Paducah,* 3 S. W. 802, 8 Ky. Law Rep. 870, decided before the present Constitution, the city was authorized by its charter to collect a license upon certain occupations and professions, among them being attorney at law. In adjudging the right of the Legislature to authorize the imposition of such tax the court said: 'It is well settled that a license upon any trade, profession, or calling may be imposed under legislative authority. It is in effect a tax on the profession or calling, and must be levied on all alike in the trade or profession singled out for taxation.

* * * * * * * *

"The vice in the law is that, in undertaking to single out for taxation the occupation of real estate agents, it not only taxes them in unequal amounts, depending upon the place in the State where they do business, but also exempts entirely

other real estate agents, thus plainly discriminating against real estate agents who live or have a place of business in a city or town, in favor of those who do not live and have no place of business in a city or town.

* * * * * * * *

"But there should be no two opinions that an act that arbitrarily singles out for taxation a certain class of persons, and exempts some of them altogether, is unfair and unequal."

(*Id.,* 128 Ky., pp. 12-13-14-15-16-19-20.)

There is no room for fair dispute that the statute complained of in this case does the very thing denounced by the Court. IT SINGLES OUT FOR TAXATION A CERTAIN CLASS OF PROPERTY, VIZ.: DEBTS SECURED BY RECORDED MORTGAGES, AND EXEMPTS A LARGE PART THEREOF FROM THE TAX.

In *Simrall* v. *City of Covington,* the Court, in declaring a city ordinance unconstitutional and void which imposed a tax on insurance agents who represented companies located outside of the city and required none from agents of companies located in the city, used the following language:

"* * * All recognize the rule, which is fundamental, that the by-laws of a municipality, whether they purport to regulate callings or otherwise must, *as indeed must every law,* preserve equality of right. *Those exercising the same privilege must be treated alike.* The door must be closed to none by discrimination if we would avoid monopoly and wrong. This principle is as necessary to sound legislation as the circulation of the

blood is to the human system, or the flow of tide-water to the ocean. * * *"

(*Simrall* v. *City of Covington*, 90 Ky. 450.)
(Italics ours.)

VOLUNTARY PAYMENT OF TAX NO DEFENSE.

Prior to the decision of *Craig* v. *Security Refining Company*, 189 Ky. 566, it had been held in several cases that the voluntary payment of an unlawful tax by the taxpayer precluded his right to recover the tax under Section 163, Kentucky Statutes.

The various cases in which such rulings had been made were expressly overruled in the case last named.

The suit in that case was to recover money paid to the State by mistake and not under compulsion or protest.

The contention was made that recovery could not be had on the ground and for the reason that payment of the tax was voluntary.

We quote:

"It is conceded that the Security Producing & Refining Company paid, through mistake of law, the taxes for 1918 and 1919, under sections 4189a and 4189c, when it was required to and did pay to the state a license tax equal to one per centum of the market value of the crude petroleum produced by it. It thus paid two license taxes when it was liable for only one. When it became liable for the license tax under section 4223c on its oil production, it was by the provisions of section 4189a relieved of liability for a license tax upon its capital

stock, but it paid both these taxes and now seeks to recover the sum paid as the latter.

* * * * * * * *

"Fundamentally no tax can be levied or collected by the state except under and by authority of legislative enactment. Money otherwise received by the state as taxes is unwarranted, and should be returned to the payor upon his compliance with the provisions of section 163, Kentucky Statutes. It is admitted that the money sought to be recovered in this action, though paid as taxes, was not due as such, and the security company by mistake of law paid the same though unwilling to do so, had it comprehended its legal rights. The attempted assessment made by the state tax commission was unwarranted and void because no such license tax was due at that time from the corporation. Money so paid as taxes should be returned to the payor on his timely application. The statutes, section 162, which provides that when it shall appear to the auditor that money has been paid into the treasury as taxes when none were in fact due, *shall* be returned to the payor, was intended to cover all such cases. Such improper payment of money into the treasury as taxes can not but appear to the auditor by a glance at the statutes. He does not have to go into or review the attempted assessment made by the state tax commission but need only acquaint himself with the facts and look at the statutes imposing the tax on corporations to have it certainly appear to him that money has been paid into the treasury as taxes by *the corporation when no such taxes were in fact due.* When it does so appear to the auditor it is his duty to and he may be compelled by mandamus to issue

his warrant on the treasury in repayment of the same. In every case where money is received as taxes when not authorized by statute or in violation thereof the duty immediately devolves on the auditor, upon proper application by the person paying the same, to issue his warrant on the treasury in repayment of said sum to the payor. It can appear to the auditor that money has been paid into the treasury as taxes when none are due in at least two ways: (1) when there is no warrant in the statutory law of the state for the levy or collection of such taxes; (2) when the improper and unwarranted payment is made under a void or unenforceable statute or through mistake or inadvertence of the taxpayer, directly into the treasury or to the auditor. In either of such cases it cannot fail to appear to the auditor upon proper investigation that money has been paid into the treasury as taxes when no such taxes were in fact due, and it then becomes his duty to and he *shall* issue his warrant on the treasury for the repayment of the money so improperly paid in behalf of the person who paid the same, provided proper application is made therefor. Manifestly the purpose of the legislature in passing section 162, *supra,* was to secure the return of all money paid into the treasury as taxes by taxpayers through mistake, inadvertence, misapprehension of the law, or under void or unenforceable statutes, for it expressly declares it to be the duty of the auditor to issue his warrant in every case where it shall appear to him that the state holds money rightfully and in good conscience belonging to another.

"Following this rule the auditor should have promptly issued his warrant on the treasury for

$1,500.00 in favor of appellee, Security Producing and Refining Company.

"The auditor cannot act arbitrarily in the payment of money but will be held to strict accountability for all money paid out by him. In doubtful cases he should refuse payment until the question has been determined by the courts. But in every case, such as this, where it is made to appear to the auditor that money has been paid into the treasury as taxes when no such taxes were in fact due, and demand has been made for its return within the time and in the manner provided by section 163, Kentucky Statutes, he should promptly draw his warrant on the treasury, and return to the payor the money thus received, but the auditor is not required to go into or review assessments of taxing agencies to determine whether the payment is due or not.

"The cases of Bank of Commerce of Louisville v. Stone, 108 Ky. 427, and Greene, Auditor, v. Taylor, *supra;* Louisville City National Bank v. Coulter, 112 Ky. 584; County v. Bosworth, 160 Ky. 312; Louisville Gas Co. v. Bosworth, 169 Ky. 824, and all other cases announcing a similar rule, in so far as they conflict with the construction herein given section 162, Kentucky Statutes, are expressly overruled. We can think of no reason why the state should not be required to live up to the same moral standards demanded of individuals and repay money received by it through mistake or inadvertence. Any other rule is unconscionable and bad in morals if not actually dishonest."

(Craig, Auditor, v. Security Producing & Refining Co., 189 Ky., pp. 566-7-8-9.)

No better or clearer statement of the law could be made and that the construction thus placed upon Section 162 of the Kentucky Statutes authorizes suit for the recovery of money paid as taxes when it was not in fact due, is sound in morals as in law, may not be disputed, so that discussion of any alleged objection on the ground of voluntary payment is no longer necessary. *The facts alleged in the petition, however, show that the payment of the taxes claimed in this case was not voluntary.*

Fed. Land Bank of N. Orleans v. Crossland, 261 U. S. 734 (67 L. Ed. 703).

RESUME'.

We believe that the authorities we have cited support our contention:

(1) That the tax imposed by Section 4019a, Kentucky Statutes, is, what it purports to be, a tax upon indebtedness, that is upon property—that the statute expressly exempts from its operation other property of the same class;

(2) That the statute is, therefore, in plain and direct violation of the equality and uniformity clauses of Section 171 of the Kentucky Constitution and of the Fourteenth Amendment to the Constitution of the United States;

(3) That the real nature of the tax imposed by the statute cannot be changed by calling it "a privilege or license tax." Its true character is determined by its incidents;

(4) That the United States Supreme Court must determine for itself whether or not the State statute complained of in this case, 4019a, Kentucky Statutes, violates the Federal Constitution;

(5) That a classification of property for taxation to be valid must rest upon some reasonable ground of difference which bears a just and reasonable relation to the attempted classification—and that there is no rational ground upon which an indebtedness to a Building and Loan Association or an indebtedness maturing in less than five years, say in four years and eleven months, can be distinguished from a like indebtedness maturing in five years or more—that such an attempted classification of property or property rights for taxation is arbitrary and unreasonable, the enormity of which in the instant case is made to appear from the undeniable fact that if the bonds, $150,000,000 secured by the mortgage in this case referred to, matured within five years, the recording fee would be One Dollar and Twenty-five cents ($1.25) and two cents (2¢) for every twenty words in excess of twelve hundred words, less than One Hundred Dollars ($100) in all—whereas, because the indebtedness secured by the mortgage does not mature in less than five years, and for no other reason, THE TAX WHICH APPELLANT WILL BE REQUIRED TO PAY UNDER THE STATUTE IS $300,000 IN ADDITION TO THE RECORDING FEE AS ABOVE.

A law which could, under substantially similar conditions, produce such a result, shocks the sense of justice and if such a law could be up-

held it would, it seems to us, make a mockery of the Federal Constitution and of its boasted guarantee of "equal protection."

(6) That Section 4019a, Kentucky Statutes, is class legislation of the most vicious character, and was obviously framed and fashioned to catch and penalize only corporations whose financial requirements compel them to issue bonds maturing more than five years from the date of issue, while exempting all others, is too evident to call for discussion. Plainly the statute sanctions spoliation and is of the kind and class which the United States Supreme Court has so often and so justly condemned.

We confidently ask for a reversal of the judgment appealed from.

Respectfully submitted,

MATTHEW O'DOHERTY,
Counsel for Louisville Gas and Electric Company, Plaintiff-in-Error.

ALEX. P. HUMPHREY,
CUMMINS, ROEMER & FLYNN,
Of Counsel.

APPENDIX.

FOR CONVENIENCE, WE GIVE HERE THE CONSTITUTIONAL PROVISIONS AND STATUTES TO BE CONSIDERED IN THIS CASE.

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." * * *

14th Amendment, Constitution—U. S.

"All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this constitution; * * *"

Bill of Rights—Ky. Constitution, Section 3.

"Property exempt; cities may exempt manufactories.—There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or

corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments, and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; household goods and other personal property of a person with a family, not exceeding two hundred and fifty dollars ($250.00) in value; crops grown in the year in which the assessment is made, and in the hands of the producer; AND ALL LAWS EXEMPTING OR COMMUTING PROPERTY FROM TAXATION OTHER THAN THE PROPERTY ABOVE MENTIONED SHALL BE VOID. The general assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location." (Capitals ours.)

Section 170, Kentucky Constitution.

"The General Assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax;

and all taxes shall be levied and collected by general laws. * * *"

Section 171, Kentucky Constitution.

"Taxes Wrongfully Collected Refunded.—When it shall appear to the auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. * * *"

Section 162, Kentucky Statutes.

"All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses or franchises."

Section 174, Kentucky Constitution.

"A tax of twenty cents (20¢) is hereby imposed upon each one hundred dollars ($100.00) or fraction thereof of indebtedness which is, or may be, in any contingency secured by any mortgage of property in this State, which mortgage shall be lodged for record after this act goes into effect where the indebtedness does not mature within five years. If any such mortgage includes property outside of the state, such tax shall be imposed upon such proportion of the whole debt secured thereby as the value of the property in

this state included therein bears to the whole of the property included therein. The county clerk first receiving such instrument for record shall determine the amount of such tax from affidavits of the mortgagor or its officers as to such proportionate value or from other satisfactory evidence.

"If a mortgage is made to a mortgagee in trust to secure the payment of bonds or other obligations to be issued thereafter, a statement may be incorporated therein of the amount and description of each obligation already issued or to be issued forthwith, and the tax to be paid on filing such mortgage for record or registration shall be computed upon the amount so stated. Such statements shall be binding and conclusive upon all persons claiming through or under the mortgage, and no additional obligations shall be issued or certified by the trustee until the additional tax thereon shall have been paid and the receipt of the proper county clerk issued therefor and recorded upon the margin of the record of said mortgage.

"If any such mortgagor shall issue or if any such trustee shall certify or aid in the issuance of any such obligations without the payment of the tax as herein provided, they shall each be subject to a penalty of five times the amount of such tax that should have been paid." * * *

Ky. Statutes, Sec. 4019a.

"Hereafter * * * County Clerks of County Courts * * * shall receive the following fees for services performed by them. * * *

"For recording a mortgage of real estate certificates and all services connected with the same, provided the entire record does not exceed twelve hundred (1200) words $1.25

"And for all over 1200 words two cents (2¢) for every twenty words."

Ky. Statutes, Sec. 1720.

Deeds and mortgages not valid against purchasers or creditors until recorded; who are creditors. No deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deed or mortgage shall be acknowledged or proved according to law and lodged for record.

The word "creditors" as used herein shall include all creditors, irrespective of whether or not they may have acquired a lien by legal or equitable proceedings or by voluntary conveyance."

(496 Kentucky Statutes.)

> "Section 4022, Kentucky Statutes. Real Estate and personal property; what it includes.—For the purpose of taxation, real estate shall include all lands within this State and improvements thereon; and personal estate shall include every other species and character of property—that which is tangible as well as that which is intangible."

By Section 4 of the Acts of the General Assembly of Kentucky of 1918, the annual tax levy on bonds and

other securities (not exempt) was placed at 40 cents on each $100.00 of value. This was later changed to 50 cents on each $100.00 of value—the present prevailing rate—by Chapter 116, page 402, Acts of General Assembly of Kentucky, 1924.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. [redacted] 70

Louisville Gas & Electric Company, - Plaintiff-in-Error,

vs.

W. H. Shanks, Auditor of State of Kentucky, - - - Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR

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Attorney General of Kentucky.

CHARLES F. CREAL,
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of Kentucky.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 388

LOUISVILLE GAS AND ELECTRIC COMPANY,
Plaintiff-in-Error,

versus

W. H. SHANKS, AUDITOR OF STATE OF KENTUCKY, - - - - - - *Defendant-in-Error.*

BRIEF FOR DEFENDANT-IN-ERROR

May it Please the Court:

STATEMENT

In this action the plaintiff-in-error is attacking the constitutionality of section 4019a-9, Kentucky Statutes, (Acts General Assembly of Kentucky 1917, chapter 11, page 44, section 9), its contention being that said section violates sections 3, 170 and 171 of the Constitution of Kentucky and also the Fourteenth Amendment of the Federal Constitution.

We note that the greater part of the brief filed by attorneys for plaintiff-in-error is devoted to a discussion of alleged conflict of the statute in question with the Constitution of the State. The Court of Appeals of Ken-

tucky has been called upon to construe the statute under consideration and has definitely determined that it does not violate the provisions of either the State or Federal Constitution, and we feel safe in assuming that when it is once made to appear to this Honorable Court that the highest court of the State has construed the statute and found it not to be in conflict with the State Constitution, no further consideration will be given to any seeming conflict with that instrument. In other words this Court will only consider whether the statute, as construed by the State Court, runs counter to any provision of the Constitution of the United States. We shall not enter into an extended discussion as to any alleged conflict with the Constitution of the State but shall content ourselves with showing that the Court of Appeals has determined every question raised adversely to the contention of plaintiff-in-error, and has construed the statute in favor of its constitutionality.

I.

STATE COURT HAS HELD THE STATUTE NOT TO BE IN CONFLICT WITH STATE OR FEDERAL CONSTITUTION.

The Court of Appeals of Kentucky was first called upon to construe the statute under consideration with respect to the nature of the tax imposed and as to its constitutionality in the case of Middendorf, Clerk v. Goodale, et al., Trustees, 202 Ky. 118. It appears from the opinion of the Court in that case that the same objections were urged against the statute as are in the instant case. We gather from the opinion that Goodale and others, as trustees for certain railroad companies, offered for record to Middendorf, clerk of the county court of Kenton county, Kentucky, a mortgage, deed of trust or other instrument constituting a mortgage within the meaning of section 4019a-9, Kentucky Statutes, but the

clerk refused to receive the instrument for record without the payment of the tax provided for under said section. The trustees instituted suit in the circuit court of Kenton county, seeking a writ of mandamus to compel the clerk to record the instrument without the payment of a tax. A demurrer was interposed to the petition which was overruled by the Court, and the state declining to further plead, the Circuit Court granted the relief sought. An appeal was prosecuted on behalf of the Commonwealth by Hon. Charles I. Dawson, Attorney General of the State, with the result that the judgment of the lower court was reversed with directions to the lower court to sustain the demurrer to the petition.

We shall for convenience attempt to discuss separately the different questions disposed of in the Middendorf case.

(a) The Tax Imposed by the Statute is Not a Property Tax Authorized by Section 171 of the State Constitution, but the Authority for the Tax is to be Found in Sectionn 181.

Section 171 of the Constitution of the State makes provision for what is known as the ordinary *ad valorem* or property tax. So much of section 181 of the Constitution as is pertinent reads as follows: " . . . The general assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax. . . . "

While it may be urged that recording a mortgage is not a trade, occupation or profession within the meaning of section 181, yet the provisions of said section that "The general assembly may, . . . provide for the payment . . . (of) a special or excise tax" is broad enough to cover a tax for the privilege of recording a mortgage.

As the opinion of the Court in the Middendorf case is so clear and exhaustive, and so many authorities are cited in support of the Court's conclusions, we shall quote at length from the opinion including quotations from many of the authorities cited.

As to the nature of the tax imposed the court said:

(Page 126).

"Our consideration of section 4019a-9, Kentucky Statutes, has brought us to the conclusion that the tax imposed by it is a privilege tax; that is, a tax imposed upon the privilege of recording mortgages and instruments creating like liens, the payment of which is entirely optional with the owners or holders thereof."

(Pages 127-132).

"Another distinguishing feature of the mortgage recording tax is, that it is required to be paid but once; that is, when the mortgage is lodged for record; and this is so whether the ownership of the mortgage be retained by the mortgagee or other beneficiary named therein, or shall pass by assignment to another.

"While what we have thus far said of the tax in question would seem sufficient to show wherein it differs from the property tax, a brief statement of the nature and characteristics of the latter tax will give emphasis to the differentiation.

"In this state property taxation is authorized and, in large part, regulated by section 171, Constitution, as amended, which in part provides:

" 'The legislature shall provide by law an *annual tax*, which with other resources shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax.'

"The property tax is ordinarily an *ad valorem* tax, but whatever its form, it is levied by virtue of an assessment, and payable annually; that is, a tax which must be paid, on the property subject to taxation, by the owner, year by year; and this annual burden of taxation will rest on the property so long as it exists and remains within the territorial limits of the authority levying the tax. And this would be so, even if the ownership of the property were changed, as in that event the tax would have to be paid by the person owning it when the tax was assessed and levied. It is likewise true of the property tax that its payment is not optional with the person against whom, or whose property, it is assessed. Its payment is compulsory and if not voluntarily made in a given time, the property tax may, after the necessary advertisement, be summarily seized and sold by the tax collector for the tax due and costs of sale, together with the penalty imposed by the statute for its nonpayment within the required period.

"While this court has not heretofore been directly called upon to decide whether the tax in question is a privilege or a property tax, courts of last resort of several other states have declared such tax a privilege tax and sustained the constitutionality of statutes imposing it, the provisions of which are substantially the same as those contained in the statute of this state under consideration. In one of these cases, Pocohontas Collieries Company v. Commonwealth, 113 Va. 108, the instrument for the recording of which the tax imposed by the Virginia statute was demanded, was a deed of trust securing the payment of certain bonds issued, or to be issued, in accordance with its provisions, and the court in setting forth the reasons supporting its conclusion that the tax was not a property, but a privilege tax, the imposition of which would not, as claimed by the appellant, violate any of the provisions of section 168, of the Virginia Constitution, or of the Fourteenth Amendment to the Constitution of the United States, in its opinion, in part, said:

" '*In the first place, this is not a tax upon property, either within or out of the state, but a tax upon a civil privilege, that is for the privilege of availing, upon the terms prescribed by statute, of the benefits and advantages of the registration laws of the state.* Therefore, the numerous authorities cited and ably presented and argued by learned counsel for appellant, in support of the contention that the assessment and collection of the tax in question violated the said provision of the Constitution of the United States, have no sort of bearing upon the issue in this case. While we have no decision by this court directly holding that a tax on the recordation of the deed is not a tax on property, in an analogous case, Eyre v. Jacobs, Sheriff, 14 Gratt. (55 Va.) 422, the court held that a collateral inheritance tax upon the succession or transmission of property is a tax upon a civil right or privilege, and not a tax on property. Whether the tax on the recordation of a deed conveying property to the United States was a tax on property that could not be enforced against the United States, or a tax upon a mere civil right which could be so enforced, was the question presented to Hon. A. H. Garland, the then Attorney General of the United States, in October, 1887, and he advised that the tax was not upon property, but upon a civil right, and directed the payment of the tax. (Opinions of Attorney General of the U. S., vol. 18, p. 491.) . . . A tax on property is measured in its assessment and collection in the mode prescribed by statute, while a tax upon a license or civil privilege is imposed and fixed as to amount, by classification of the persons or subjects required to pay the tax; *and the powers of the legislature to impose the latter tax, to fix the amount thereof and to classify the subjects upon which the tax is imposed, are well nigh unlimited as long as the classification is reasonable.*'

"In the later case of Saville v. Virginia Railway and Power Company, 114 Va. 445, the same court after a further consideration of the statute imposing this tax, again sustained its constitutionality and declared the tax thereby imposed a privilege tax;

and in so holding, what was mainly said by the court with respect to the character of the tax is contained in the following excerpt from the opinion:

"'No one is requiring the Virginia Railway and Power Company to spread this indenture upon the record. It is free to do as it pleases in that respect. It would not have executed the mortgage, in the first place, but that it desired for its own advantage, to furnish the best security it could provide for the payment of its bonds and thereby enhance their value upon the market. In furtherance of this purpose, it sought the privilege of having its second mortgage spread upon the record of the chancery court of the city of Richmond, and for that privilege the state has seen fit to impose the tax which the clerk of that court demanded.'

"In the State v. Alabama Fuel and Iron Company, 53 L. R. A. (N. S.) 185, (66 Southern Rep. 169), it was held by the supreme court of Alabama that a mortgage recording tax imposed by a statute of that state, quite similar in its provisions to the one we are here considering, was a privilege tax and not a property tax. And in Union Trust Company v. Com. Council of City of Detroit, 170 Mich. 692, the Michigan Supreme Court sustained the validity of the statute imposing a like tax, holding that it was permitted by the Constitution of that state to impose, as it did, such a tax in lieu of an *ad valorem* tax.

"In view of the conclusion reached by the supreme court of appeals of Virginia in the earlier case of Eyre v. Jacobs, Sheriff, 14 Gratt. (55 Va.) 422, cited with approval in Pocohontas Collieries Co. v. Comlth., *supra*, that a collateral inheritance tax upon the succession or transmission of property was a tax upon a civil right or privilege, and not a tax on property, it can readily be understood why the same court in the latter case should have regarded that ruling decisive of the character of the mortgage recording tax imposed by the Virginia statute, which it held to be a like tax.

"It should be here remarked that this court in the case of Booth's Exor. v. Comlth., 130 Ky. 88,

sustained the constitutionality of a statute of this state authorizing the imposition of a collateral inheritance tax upon the succession or transmission of property (chap. 22, article 18, Acts General Assembly 1906, p. 240, now section —, Ky. Stats.) in doing which, among other things, it held that the power to tax is incident to the legislative power so that it is necessary, not that the Constitution have a provision authorizing the imposition of an inheritance tax, but that it does prohibit it; that the right to take property by inheritance or bequest is but a creature of the law, and not an absolute right of property, hence it may be regulated by the state and subjected to a tax as an incident of such regulation; and, finally, that an inheritance tax is not a 'tax on property,' within the meaning of section 171, Constitution, requiring uniformity and equality of taxes on all property subject to taxation, but a special or excise tax authorized by section 181, Constitution, the word 'excise' being a term of such general significance as to include in its meaning 'tribute, custom, tax, tollage or assessment.'

"So it may well be said that by reason of the marked resemblance apparent in many of the essential features common to both, as well as by analogous construction, the conclusion cannot be escaped that the mortgage recording tax and inheritance tax, though by the courts the former is called a privilege tax, and the latter a special or excise tax, are substantially identical in character; and this being so, the imposition and collection of each is authorized by section 181, Constitution, which empowers the legislature and the taxing authorities of municipalities by general laws to provide by way of taxation:

" 'For the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, *or a special or excise tax.*'

"While it was held in Booth's Exor. v. Comlth., *supra,* that the imposition of the inheritance tax was expressly authorized by this section of the Constitution, it was also declared in the opinion: 'but the

legislature, without this express authority, could have imposed such a tax under the general legislative power before mentioned; there being no provision of the Constitution forbidding it.' As expressive of our view of the scope and meaning of the phrase 'the legislative power,' as used in defining the authority conferred upon the General Assembly by section 29, Constitution, we adopted and made a part of the opinion the following excerpt from Cooley on Taxation, chap. 1, pp. 1-2:

" 'The power of taxation is an incident of sovereignty, and is possessed by the government without being expressly conferred by the people. It is a legislative power, and when the people, by their Constitution, create a department of government upon which they confer the power to make laws, the power of taxation is conferred as a part of the more general power. . . . Everything to which the legislative power extends may be the subject of taxation, whether it be person, or property, or possession, franchise, or privilege, or occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes; and not only is the power unlimited in its reach as to subjects, but in its very nature it acknowledges no limits, and may be carried even to exhaustion and destruction, thus becoming in its exercise a power to destroy. If the power be threatened with abuse, security must be found in the responsibility of the legislature that imposes the tax to the constituency which must pay it. The judiciary can afford no redress against oppressive taxation, so long as the legislature, in imposing it, violates no express provision of the Constitution. The necessity for imposing it addresses itself to the legislative discretion, and it is or may be an urgent necessity, which will admit of no property or other conflicting right in the citizen while it remains unsatisfied.'

> "As the correctness of our conclusion that the mortage recording tax in question is a privilege tax is, we think, sustained by the reasons stated and authorities cited in support thereof. . . ."

In addition to what the Court said in regard to the nature of the tax, we might add that the title of the act clearly discloses that it was the legislative intent and desire that the tax imposed should be for the privilege of recording mortgages and not an *ad valorem* tax on the indebtedness. So much of the title of the act as relates to the tax in question reads as follows: ". . . providing an additional tax for recording certain mortgages."

(b) The Exemption Granted by the Act Does Not Violate Sections 3 or 170 of the State Constitution.

The Court of Appeals in disposing of the contention that the concluding clause of the act which provides that "the provisions of this section shall not apply to mortgages executed to building and loan associations," after distinguishing mortgages executed to building and loan associations and citing authorities in support of the distinction made (pages 123-124), summed up on pages 124 and 125 of the opinion as follows:

> "It is patent from what has been said that the object of the legislature in enacting the statute, *supra,* was to provide the members of building and loan associations with a means of borrowing money for the acquisition of homes on the most favorable terms. The statute, therefore, is a manifest recognition by the legislature of the duty of the state to encourage the acquisition of homes by its citizens. Certainly the object is one to be commended, for nothing contributes in greater degree to the prosperity, happiness and patriotism of its citizenship, and the

stability of its government, than does the ownership by the latter of homes; and it is a matter of common knowledge that thousands of persons of small means throughout the United States, by membership in and loans obtained from building and loan associations, have been enabled to become the owners of homes, who but for such assistance, would or might not have done so."

Continuing the discussion of this feature of the case, the Court, after a full discussion of the nature of the tax as hereinbefore quoted, said at pages 132 to 134:

" . . . the only question that remains to be determined is, whether it was competent for the legislature, in enacting the statute imposing the tax, to classify the persons availing themselves of the privilege of putting to record mortgages securing indebtedness, by requiring of some of them payment of the tax, and exempting others from its payment. That the legislature possessed and may exercise such power the authorities all agree, but in order for the legislation to be valid, the classification must be a reasonable one and the law be made to apply alike to all persons in the class against which it is directed.

"As the inheritance tax is of the class to which the mortgage recording tax also belongs and, by analogy, what has been judicially said in sustaining its validity is equally applicable to the latter tax, with respect to complaints of its alleged inequality and want of uniformity, we in Booth's Exor. v. Comlth., *supra,* said:

" 'The provisions with respect to equality and uniformity found in section 171, Constitution, apply to a direct tax on property. They do not limit the power of the legislature as to the objects of taxation, but are more especially intended to prevent an arbitrary taxation of property according to kind or quality, without regard to value. We are, however, unable to see that the inequality and want of uniformity complained of by appellant exist in the statute under consideration, for every person not of the

class exempted by the act from the payment of the tax, who takes from the estate of a decedent by succession or devise, pays a tax for the privilege, and this tax is proportioned to the value of the interest which he acquires. Nor does the exemption, where the estate is of the value of $500.00, or less, constitute inequality or unjust discrimination.' Magoun v. Ill. Trust & Savings Bank, 170 U. S. 283; United States v. Perkins, 163 U. S. 625; Strode v. Comlth., 52 Pa. 181; Minnot v. Winthrop, 162 Mass. 113.

"The power of the legislature to classify trades, occupations, professions or persons and subjects upon which or whom it proposes to impose a special or excise tax, is well recognized in this jurisdiction and has been expressed in numerous decisions of this court. In one of these cases, Hagar, Auditor v. Walker, 128 Ky. 1, we in part said:

" 'We also believe that it is competent for the legislature under this section (181 Constitution), by general laws for state purposes, as well as by general law delegating the power to the municipalities mentioned, to divide trades, occupations and professions into classes and to impose a different license fee upon each class that the trade, occupation or profession may fairly and reasonably be divided into. . . . Any one or more trades, occupations may be singled out for taxation, and all the others not thus selected be exempted. It will thus be seen that according to our construction of this section, it is susceptible of wide and varying application.'

"To like effect is the case of Strater Bros. Tobacco Co. v. Comlth., 117 Ky. 604. We are unable to find in the statute imposing the tax in question either the inequality or want of uniformity charged by the appellees, for every person not of the class exempted by the act from the payment of the tax, who avails himself of the privilege accorded by it, of having his mortgage recorded, pays the tax imposed for that privilege, which is proportioned to the value of the security thereby attained. Nor does the exemption where the mortgage debt matures within five years, nor that of building and loan as-

sociations, constitute inequality or unjust discrimination. Indeed, there is nothing unreasonable or arbitrary in the classification resulting from either of these exemptions; and as to that of building and loan associations, we may add to what has previously been said of them and the sound public policy underlying the fostering care uniformly bestowed upon them by the legislature, that their exemption from the payment of the mortgage recording tax is not unreasonable in view of the necessity that requires the continuance of their existence by way of governmental aid. It follows from what has been said, that we find no merit in any of the appellant's contentions that the statute in question is obnoxious to or violative of the provisions, or any provision, of the Constitution of this state; and, as the tax imposed by the statute is, in our opinion, a privilege tax, it is unnecessary for us to determine whether, if it were a property tax, the objections urged to its constitutionality by the appellees, would be sound."

It will be seen from an examination of sections 3 and 170 of the Constitution of Kentucky that their provisions only relate to exemption of property from taxation and in no wise apply to taxes imposed under section 181 of the Constitution.

(c) The Statute Does Not Violate Provisions of the Fourteenth Amendment.

In holding that the statute under consideration does not violate the Fourteenth Amendment of the Federal Constitution, the Court of Appeals at pages 135-136 said:

"We also find ourselves unable to discover any merit in the appellees' final contention, that the statute under consideration violates article 1, of the Fourteenth Amendment to the Federal Constitution; and in order to demonstrate that it does not in lan-

guage or meaning deny to all persons, or any class of persons, 'within the jurisdiction of the state of Kentucky the equal protection of the laws of the state,' it is only necessary to apply to the statute the test supplied by the numerous decisions of the Supreme Court construing that amendment. One of the clearest opinions of that court on the subject is that of Am. Sugar Refining Co. v. Louisiana, 179 U. S. 89, from which the following excerpt is quoted:

" 'The power of taxation under this provision was fully considered in Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. Ed. 892, 10 Sup. Ct. Rep. 533, in which it was said not to have been intended to prevent a state from changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only, and not securities; may allow or not allow deductions for indebtedness.

" 'All such regulations, and those of like character, so long as they proceed, within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framing their Constitution.'

"To the same effect are the following cases decided by the same court, viz.: Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232; Grazza v. Tierman, 148 U. S. 655; Mich. Central R. R. Co. v. Powers, 201 U. S. 248.

"Viewed in the light furnished by the foregoing tests contained in the authorities, *supra,* the conclusion is inevitable, that the statute in question is in no wise obnoxious to the Fourteenth Amendment to the Constitution of the United States."

In the case under consideration the Court of Appeals of Kentucky reaffirmed its finding in the Middendorf case

and in its opinion (record pages 10 and 11, 213 Ky. 762, 763), among other things, said:

> "By this appeal appellant attacks section 4019a-9, Kentucky Statutes, as being in violation of the Fourteenth Amendment of the Constitution of the United States, and of section 3 of the Bill of Rights, and sections 170 and 171 of the Constitution of Kentucky. The statute in question provides that for the privilege of recording mortgages when the indebtedness so secured does not mature within five years, a tax of 20 cents upon each $100.00 or fractional part thereof of such indebtedness shall be paid, exempting from its operation mortgages to building and loan associations. The case of Middendorf, Clerk, etc. v. Goodale, et al., Trustee, 202 Ky. 118, presented to this court the exact questions here raised. There the statute in question was attacked from the same positions taken by appellant here. The Middendorf case was orally argued to and was considered by the whole court. The opinion deals exhaustively with all the questions raised by appellant as affecting the validity and constitutionality of the statute in question. The conclusion of this court that the statute in question does not contravene any of the provisions of either the federal or state Constitutions was reached after giving full weight to all of the arguments now made by appellant, and after deliberate consideration of the questions involved. That opinion expresses this court's views upon all of them fully and clearly. Repetition is not deemed to be necessary."

It is contended that in the earlier case of Greene, Auditor v. Federal Coal Company, 184 Ky. 664, the Court held that the tax in question was a property tax but the Court disposes of this contention in Middendorf v. Goodale, *supra,* at page 134.

> "It is insisted for the appellees that in Greene, Auditor v. Federal Coal Company, 184 Ky. 664, it

was, in effect, held by this court that the tax in question is a property tax. While it was stated that the tax therein involved, which is the same here in question, was one imposed upon the indebtedness secured by the mortgage executed in that case, it will be discovered from a reading of the opinion that the statement referred to was incidentally and inadvertently made, for the question whether the tax was a privilege tax, or a property tax, was not raised or considered in that case."

II.

THE CONSTRUCTION OF A STATE STATUTE BY THE HIGHEST COURT OF THE STATE WILL BE ACCEPTED AS CONCLUSIVE BY THE SUPREME COURT.

The highest court of the State of Kentucky having construed the statute as imposing a special tax authorized by section 181 of the State Constitution for the privilege of recording a mortgage, and having held that same does not violate the State Constitution, this Honorable Court will accept the State Court's construction, and then determine whether the statute as so construed infringes on the provisions of the Constitution of the United States.

> "The settled construction of a state statute by its supreme court is considered a part of the statute itself."
>
> Massingill v. Down, 7 How. 760.
>
> "But the elementary rule is that this court accepts the interpretation of the statute of a state affixed to it by the court of last resort thereof."
>
> M. K. & T. Ry. Co. v. McCann, 174 U. S. 580, 586.

In the case of Brown-Forman Co. v. Kentucky, 217 U. S. 563, which came up on writ of error from the Court

of Appeals of Kentucky, contention was made that a statute of the state imposing a tax upon the business or occupation of compounding, rectifying, etc., distilled spirits was a tax upon property and was repugnant to both the State and Federal Constitution. The State Court upheld the act as imposing a valid license tax, and this Court in affirming the decision, among other things, said:

(Page 569.)

"The questions concerning the validity of the act under the state Constitution and as to the liability of the plaintiff in error under the act as construed and enforced by the highest court of Kentucky, may be laid on one side, for the only contentions which concern us under this writ of error to the state court are those which arise under the Constitution of the United States."

And again on pages 571 and 572:

"It has been urged that the tax is not imposed as a license upon the doing of business, but is laid upon the goods produced, and is therefore arbitrary and discriminatory as one not imposed upon all other like kinds of liquor, whether produced in or out of the state. This contention, if good, would only carry the case back to the underlying objection that the classification is arbitrary and unreasonable, and therefore void, as denying the equal protection of the law, a question which at last must be answered, whether the tax be an occupation or a property tax. But the Kentucky Court of Appeals has construed the act as not a property tax, but as one imposing a license or occupation tax upon the business. Speaking by Judge Hobson, the Kentucky Court of Appeals said: 'A license tax is imposed. The amount of the license tax is determined by the amount of the spirits produced. The tax is not upon the spirits. It is a license tax upon the business. . . .' Such a construction and interpretation of the statute here involved, by the highest court of the state, should

be accepted as definitely determining that the tax complained of is not a property tax, but a license tax imposed upon the doing of a particular business plainly subject to the regulating power of the state."

The case of Dawson, Attorney General of Kentucky v. Ky. Dist. & Warehouse Co., 255 U. S. 288, is cited and relied upon by attorneys for plaintiff-in-error. This Court in that case was called upon to determine the nature of the tax imposed by an act of the Legislature of Kentucky passed in 1920, imposing a tax on every person engaged in the business of manufacturing whiskey or "in the business of owning and storing" same in bonded warehouses in the State. The Attorney General conceded that if the tax imposed by the act was a property tax it would be invalid in that it did not meet the rule of uniformity required by section 171 of the Constitution, as it would be double taxation.

The Court held the tax imposed to be a property tax, but in the opinion at page 292 said:

> "Here we are concerned only with the taxes which are alleged to be on 'the business of owning and storing such spirits in bonded warehouses.' The question is whether as to such this fifty cents a gallon tax is an occupation tax or is a property tax. The question is one of local law, so that a decision of it by the highest court of the state would be accepted by us as conclusive. But the validity of the statute does not appear to have been passed upon by any Kentucky court. We are, therefore, called upon, as were the district courts, to determine this question of state law."

In the case of Waters-Pierce Oil Company v. Texas, 177 U. S. 28, 42, 43, the Court after referring to its interpretation of certain statutes of the United States, said:

> "The courts of Texas have like power of interpretation of the statutes of Texas. What they say the statute of the state means we must accept them to mean . . . "

In the case of Swiss Oil Corporation v. Shanks, decided February 21, 1927, — U. S. —; 71 Law Edition 410, the Court said:

> "As the case is brought here from a state court, the construction put by the court below upon the statute and Constitution of its own state is not open to review here."

In the case of Michigan Central Railroad v. Powers, 201 U. S. 245, 290, 291 it was said:

> "The unconstitutionality of a statute may depend upon its conflict with the Constitution of the state or with that of the United States. If conflict with the state Constitution is the sole ground of attack, the supreme court of the state is the final authority, Merchants' Bank v. Pennsylvania, 167 U. S. 461, and cases cited in the opinion, while in the other case the ultimate decision rests with this court. The validity of this act has not been directly presented to or determined by the state court, but the first attack by the parties interested is made in the federal court and by this suit, and conflict with both Constitutions is alleged. Undoubtedly a federal court has the jurisdiction. . . . At the same time the federal courts will be reluctant to adjudge a state statute to be in conflict with the state Constitution before that question has been considered by the state tribunals. Especially is this true when the statute is one affecting the revenues of the state, and therefore of general public interest. Coulter v. Louisville & Nashville R. R. Co., 196 U. S. 599, 609. And this reluctance becomes more imperative when the statute has been before the highest court of the state and a decision rendered upon the assumption that it is valid, and this, although the direct question of validity was not presented nor determined."

In the case at bar the highest Court of the State has held the statute attacked to be valid. In other cases it

has rendered decisions upon the assumption that the statute was valid where that question was not presented for determination.

III.

THE STATUTE AS CONSTRUED BY THE STATE COURT DOES NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES.

As we see it, the only question remaining to be determined is whether a license, excise or special tax for the privilege of recording mortgages where the indebtedness does not mature within five years and from which tax mortgages made to building and loan associations are exempt, contravenes the Fourteenth Amendment to the Federal Constitution.

It is a question of classification made by the state legislature and one with which the Federal Courts will not be concerned unless and until it is made to appear that the legislature made an arbitrary and unjust discrimination between particular classes when in fact there was no real reason or basis for such discrimination.

The states in selecting objects for taxation may make discriminations and a wide range is given them in the exercise of their powers in this respect. It is only when they go beyond the well recognized limits of the sovereign powers of the state and invade the field reserved by the superior government for the exercise of federal powers that the provisions of the Federal Constitution may be invoked.

The Fourteenth Amendment has never been so applied by this Court as to interfere with the states in adopting a system of taxation or in making classifications of properties or objects for taxation. It is not even a shield against every inequality or injustice that may result from unwise state legislation. It imposes no "iron

rule of taxation" upon the states, but is only applied when there is such a clear discrimination as to amount to a denial of equal protection of the law or a deprivation of property without due process of law within the meaning of its provision.

The opinion of the Court of Appeals of Kentucky in the case of Middendorf v. Goodale, *supra,* holding that the exemptions granted do not render the statute repugnant to the Federal or State Constitution is well fortified by authorities cited, especially as to the exemption of building and loan associations. None of the authorities cited bear directly on the application of the statute to mortgages where the indebtedness matures within five years. However, many of them in principle sustain this distinction or discrimination made as to such mortgages.

The reason for the distinction as to one class is as obvious as it is to the other. No reason has been pointed out why exemption may not be granted in respect to time of maturity. We do not believe it would be seriously contended that an exemption might not have been granted as to mortgages securing indebtedness up to a certain fixed amount. The validity of such exemptions have too often been upheld by State and Federal Courts to admit of question. It would not be difficult to find reasons for the exemption of mortgages as to so much of the indebtedness as does not mature within five years.

It is a matter of common knowledge that short term loans carry the highest legal rate of interest and often, directly or indirectly, usurious rates, whereas long term loans are secured at lesser rates, usually one-half to two per cent less than the maximum legal rate. In view of this favorable interest rate the tax on the long term loan is not a great burden or hardship, the tax amounting to only one-fifth of one per cent for one year. And again a mortgagee in securing a long term loan secures his mortgaged assets to the extent of such loan and for the term

thereof against all subsequent creditors and all debts or claims arising under contract or otherwise. We might add other reasons for the distinction but the basis for it is too apparent to require elaboration.

The Congress of the United States and Federal Courts recognize such a distinction between building and loan associations and other corporations as to warrant a discrimination in favor of the former in matters of taxation. See—

Corporation Excise Tax Act, U. S. Comp. St. Supp. 1911, p. 946.
Income Tax Act, U. S. Comp. Stat. 1901, p. 2264.
War Revenue Act, Comp. Stat. 1901, p. 2297.
Central Building, Loan & Savings Co. v. Bowland, Collector, 216 Fed. 526.

The rule of uniformity and equality prescribed by the Fourteenth Amendment only requires that the statute shall apply alike to all of a class under the same circumstances and conditions. The statute under consideration meets all requirements of this rule; it applies alike to each class under similar circumstances.

The courts have upheld statutes where the reason for classification or discrimination was no more apparent than in the statute in question.

In the case of Pacific Express Co. v. Seibert, 142 U. S. 339, this Court held that a tax statute of Missouri making a distinction between express companies which owned their own facilities for carrying express, and those who engaged for hire such facilities, did not violate the Fourteenth Amendment.

In Citizens Telephone Co. v. Fuller, 229 U. S. 322, the court upheld a statute of Michigan imposing an *ad valorem* tax upon the property of telephone companies, although it exempted from taxation the property of telephone companies whose gross annual receipts did not exceed five hundred dollars.

The tax laws of West Virginia provided for a forfeiture of lands to the state where the owner for five consecutive years failed to place or cause such lands to be placed on the proper land books for taxation. Under a provision of the law tracts of less than one thousand acres were not subject to forfeiture.

This Court in the case of King v. Mullins, 171 U. S. 404, 435, held that the discrimination as to larger tracts did not deny owners the equal protection of the law guaranteed by the Constitution of the United States.

In the case of St. Louis Consolidated Coal Co. v. Illinois, 185 U. S. 203, the court upheld a statute providing for the inspection of mines, notwithstanding it only applied where more than five men were employed at one time. The statute provided for at least four inspections a year, the cost of which was to be paid by the mine owner. It also imposed strict conditions as to sanitation, etc.

In the case of N. Y., N. H. & H. Ry. Co. v. N. Y., 165 U. S. 628, it was held that a statute regulating the heating of steam passenger cars was not repugnant to that part of the Fourteenth Amendment forbidding a state from denying persons within it equal protection of the laws because the statute did not apply to railroads less than fifty miles in length, the Court at page 634 saying:

> "The statute is uniform in its operation upon all railroad companies doing business in the state of the class to which it is made applicable."

In American Sugar Refining Company v. Louisiana, 179 U. S. 89, it was held that a statute of the State of Louisiana imposing a tax upon the business of refining sugar and molasses did not, by exempting planters and farmers who ground and refined their own sugar and molasses, deny to sugar refiners the equal protection of the laws. The Court held there was undoubtedly a discrim-

ination against certain classes, but such discrimination was founded upon reasonable distinction.

In the case of Missouri Railway Co. v. Mackey, 127 U. S. 205, 209, it was said:

> "And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. . . . Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed."

In the case of Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283, it was held that the inheritance tax act of Illinois did not conflict with any provision of the Constitution of the United States. The act in question admittedly made discriminations as between classes that resulted in great inequalities. For example it was pointed out in the opinion that one who received a legacy of $10,000.00 paid 3% or $300.00, receiving $9,700.00 net, while one who received a legacy of $10,001.00 paid 4% or $404.04, receiving $9,600.96 or $99.04 less than the one whose legacy was actually $1.00 less valuable. The Court after quoting at length from other cases as to classification, among other things, said:

(Page 296.)

> "There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. Bearing these considerations in mind we can solve the questions in controversy.

> "There are three main classes in the Illinois statute, the first and second being based, respectively, on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. The latter is again divided into four subclasses dependent upon the amount of the estate received. The first two classes, therefore, depend on substantial differences, differences which may distinguish them from each other and them or either of them from the other class—differences, therefore, which 'bear a just and proper relation to the attempted classification'—the rule expressed in the Gulf, Colorado & Santa Fe Railway v. Ellis, 165 U. S. 150. And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates 'equally and uniformly upon all persons in similar circumstances.' "

Attorneys for plaintiff-in-error cite the case of Federal Land Bank v. Crossland, 261 U. S. 374, as supporting their contention. As we read that case it simply held that mortgages executed to Federal Land Banks were not subject to the mortgage recording tax law of the state of Alabama, such instruments being specifically exempted from all taxation by the Federal Farm Loan Act. The Court referring to the state's attempt to levy a general tax on mortgages said:

> "It has levied a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it. In doing so, by the construction given to the statute by the Supreme Court, it has included mortgages that it is not at liberty to reach. The characterization of the act by the Supreme Court, as distinguished from the interpretation of it, does not bind this court."

In other words a federal question was presented, and a direct conflict with the federal law was apparent,

while in the case at bar the question, as was said in Dawson v. Ky. Dist. & Wh. Co., *supra*, "is one of local law."

It has never been contended that the statute under consideration would apply to Federal Land Bank mortgages. Former Atorney General Chas. I. Dawson, as well as the present Attorney General, has held that such mortgages are not subject to the tax imposed by the statute.

It appearing that the plaintiff-in-error paid the mortgage recording tax under a valid statute, and that it is not entitled to recover from the State Treasurer the amount so paid, we respectfully ask that the judgment of the State Court be affirmed.

Respectfully submitted,

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